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Private Ownership of Public Facts: Docudramas, Deals, and Life Story Rights

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From Elizabeth Taylor to Mike Tyson, celebrities have claimed ownership of their personae. But while the right of publicity and other laws give individuals the right to control commercial exploitation of their images, voices, mannerisms and taglines, the law stops short of recognizing a property interest in the events of their lives. On the contrary, the First Amendment protects producers of expressive works when telling non-defamatory stories about real people. The intuition that exists among celebrities and lay persons alike that individuals own their "life stories" has been fueled by the decades-old

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Hollywood practice of "acquiring" life story rights from the subjects of docudrama features based on actual events, sometimes for large sums. In this Article, we explore, critique, and propose to remedy the growing privatization of life stories and show that while the life story deal may seem to reflect beneficial private ordering, it in fact creates a significant negative externality by converting an essential part of the public domain into private property, thereby upsetting the balance of shared and proprietary information on which our systems of free speech and creative expression depend. We offer a parsimonious solution to this problem: Congress should enact a new federal statute barring the enforcement of state rights of publicity against fact-based creative productions such as books, films, and television programs, provided that, for private individuals, their name, image, and likeness are altered to protect their identities. Having a single, clear rule that operates ex ante *provides uniformity and clarity that will secure the status of life story facts as part of the public domain without limiting the legal protection of individuals' dignitary, reputational, and privacy interests.*

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INTRODUCTION

In 1982, cinematic icon Elizabeth Taylor proclaimed, in response to the announcement of an unauthorized docudrama about her life,

> I am my own commodity. I am my own industry. The way I look, the way I sound, that is my industry and if somebody else portrays me and fictionalizes my life, it is taking away from me.[1]

Forty years later, former heavyweight champion Mike Tyson angrily tweeted, in less decorous terms, a similar complaint after he learned of an unauthorized Hulu series about him.[2]

To Taylor and Tyson, globally recognized celebrities accustomed to being paid for appearances, endorsements, and merchandising, it must have seemed outrageous for producers to release fictionalized portrayals of their lives without compensating them or even seeking their permission. They characterized such unauthorized depictions as nothing less than a misappropriation of property interests in the facts and events of their lives.

Yet there is no legally cognizable property interest, at least under American law, in factual information. "[I]nformation respecting current events," the Supreme Court explained more than a century ago in *INS v. Associated Press*, "is a report of matters that ordinarily are *publici juris*; it is the history of the day."[3] Or, as more succinctly put by Justice Brandeis, knowledge, once communicated to others, is "[as] free as the air to common use."[4]

Despite this unambiguous statement of law, Hollywood producers regularly seek permission from, and pay, individuals whom they wish to depict in so-called docudramas — productions blending factual accounts with dramatized or fictionalized dialog, scenes, and

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[1] Tamar Lewin, *Whose Life Is It, Anyway? Legally It's Hard to Tell*, N.Y. TIMES (Nov. 21, 1982), https://www.nytimes.com/1982/11/21/movies/whose-life-is-it-anyway-legally-it-s-hard-to-tell.html [https://perma.cc/L8E6-A73R] (quoting Elizabeth Taylor); *see also* Taylor v. Am. Broad. Co., No. 82, Civ 6977 (S.D.N.Y. 1982) (cited in Matthew Stohl, *False Light Invasion of Privacy in Docudramas: The Oxymoron Which Must Be Solved*, 35 AKRON L. REV. 251, 259 n.29 (2002).

[2] *See infra* notes 80–83 and accompanying text.

[3] Int'l News Serv. v. Associated Press, 248 U.S. 215, 234 (1918).

[4] *Id.* at 250 (Brandeis, J., dissenting).

characters.[5] This practice of acquiring "life story rights" from docudrama subjects originated during the Golden Age of Hollywood and continues today.[6] While life story acquisitions do not convey a recognized property interest, like a copyright or a trademark, they do establish a set of privately ordered contractual commitments that can be important in the production of works based on true stories.

Life story rights, as that term is commonly used throughout the entertainment industry, emerge from acquisition contracts (and related option agreements) that generally embody four sets of related provisions: (1) the producer's authorization to use and adapt factual events concerning the subject, (2) the subject's release of the producer from liability for claims arising from the production, whether for defamation, violation of the right of publicity, or otherwise, (3) a prohibition against the subject's cooperation with any other producer on a similar project, and (4) the producer's access to the subject for consultation and interviews, as well as a commitment to provide further information and/or documents, photographs, and other artifacts.[7] In short, in exchange for a payment, the purchaser of life story rights obtains a contractual package containing an authorization, a release, exclusivity, and access. As we have described in prior work, this modularization of life story rights lowers transaction costs for both producers and subjects, increases transactional efficiency and provides important signals to the market.[8]

In addition to transactional benefits, however, the bundling of life story rights in this manner begins to give factual events the outward character of *in rem* or property interests. Seen through this lens, even though the law does not (yet) recognize a positive property interest in one's life story, the principal elements negotiated in a life rights deal —

[5] *See* Jorge L. Contreras & Dave Fagundes, *The Life Story Rights Puzzle*, 14 HARV. J. SPORTS & ENT. L. 153, 155-56 n.3 (2023) (defining "docudrama" and collecting sources).

[6] *See infra* Part II.B.

[7] *See infra* Part II.C.1.

[8] *See* Contreras & Fagundes, *supra* note 5, at 159; *see also* Carol M. Rose, *Modularity, Modernist Property, and the Modern Architecture of Property*, 10 PROP. RTS. J. 69, 70-71 (2021) (noting that such modularized architectures "[save us all] from spending a great deal of time figuring out what we can and cannot do vis-á-vis all kinds of resources"); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1708 (2012).

authorization, release, access, and exclusivity — aggregated under the construct of life story rights, approach something akin to a privately engineered property right.[9] Thus, the industry practice of obtaining life story rights for docudrama productions has both germinated and perpetuated the notion that life stories — the facts and events of a person's life — have the character of formal property interests.

Today, the understanding of life story rights as property interests extends far beyond celebrities like Taylor and Tyson. The rise of the Worldwide Web in the 1990s led to debates over ways that property rights could stem the increasing appropriation of personal information by online platforms.[10] And the explosive growth of social media over the last decade, the prevalence of social media influencers and the monetization of individual personalities through technological means (clicks, eyeballs, likes, shares) both confirm and reinforce the lay intuition that one's personal story is, in fact, an enforceable, and bankable, property right.[11]

The next step in this evolutionary process could be the judicial or legislative recognition of a formal property interest in individual events and life stories. After all, scholars have advocated the recognition of property interests in a wide array of intangibles including governmental largess,[12] taxi medallions,[13] conceptual art,[14] health information,[15]

[9] *See infra* Part I.C.2.

[10] *See* Mark A. Lemley, *Private Property*, 52 STAN. L. REV. 1545, 1546 (2000) ("Recently . . . scholars have paid increasing attention to . . . vesting individual citizens with some form of intellectual property right in information about themselves."); Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1132 (2000) ("In recent years, a number of economists and legal commentators have argued that the law ought now to grant individuals property rights in their personal data." (collecting sources)).

[11] *See infra* Part I.A.2.

[12] *See* Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. POVERTY L. & POL'Y 89 (2002); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[13] *See* Tom W. Bell, Copyright Porn Trolls, *Wasting Taxi Medallions, and the Propriety of 'Property,'* 18 CHAPMAN L. REV. 799 (2015).

[14] See Peter J. Karol, Permissive Certificates: Collectors of Art as Collectors of Permissions, 94 WASH. L. REV. 1175 (2019); Guy A. Rub, Owning Nothingness: Between the Legal and the Social Norms of the Art World, 2019 BYU L. REV. 1147 (2020).

[15] *See* Jessica L. Roberts, *Progressive Genetic Ownership*, 93 NOTRE DAME L. REV. 1105 (2018).

physical and mental ability,[16] and even street gang membership.[17] In some cases, courts and legislatures have agreed with them, adding a constant stream of new intangibles to the list of what constitutes property.[18]

It is worth asking whether this expanding recognition of property rights is socially beneficial or even prudent. Some would undoubtedly say yes. Harold Demsetz and others have looked to property, with its strong rights of exclusion and allocability, as the answer to a wide range of resource usage problems.[19] Richard Posner has theorized that social value would be maximized if every valuable resource were owned by someone and ownership rights were freely transferable.[20] And Charles Reich associated property interests with personal autonomy, writing in 1964 that "in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality."[21]

Others, however, have been more skeptical. In the 1990s, scholars including Mark Lemley and Pamela Samuelson resisted calls to recognize formal property interests in personal information that were made in response to concerns over the increasing collection and aggregation of this information by online platforms.[22] Responding to more recent calls for private ownership of individual health information, Jorge Contreras cautions that complications arising from the permanence and hereditability of traditional property rights would

[16] *See* Angelica Guevara, *Ableness as Property*, 98 DENV. L. REV. F. 1 (2020).

[17] See Lua Kamál Yuille, Manufacturing Resilience on the Margins: Street Gangs, Property & Vulnerability Theory, 123 PENN. ST. L. REV. 463 (2019).

[18] *See, e.g.*, Jorge L. Contreras, *Genetic Property*, 105 GEO. L.J. 1, 6 (2016) (describing recognition by some states of property interests in human DNA information based on lay intuitions and practice of obtaining "informed consent" to collection of such information).

[19] Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967).

[20] Richard Posner, Economic Analysis of the Law 32 (3d ed. 1986).

[21] Reich, *supra* note 12, at 733.

[22] *See* Lemley, *supra* note 10, at 1547 ("[C]reating an intellectual property right in individual data is a very bad idea."); Samuelson, *supra* note 10, at 1171 ("[A] serious mismatch exists between the traditional rationale for granting property protection to an information resource and the rationale for granting individuals property rights in personal data.").

likely result in reduced medical research and increased healthcare costs.[23]

Intellectual property rights in the United States exist for explicitly instrumentalist purposes. Congress is authorized under the Constitution to award patents and copyrights "to promote the progress of science and useful arts."[24] The purpose of trademark law has likewise been framed in instrumentalist terms: reducing consumer search costs,[25] incentivizing producers to make goods of consistent quality,[26] and preventing the unfair diversion of trade to a competitor.[27] Yet none of these instrumentalist goals is served by recognizing formal property rights in individual life stories. Surely, the financial benefits flowing from legal recognition of such rights would not encourage individuals to lead more noteworthy lives, or to seek fame and celebrity, all of which have their own, inherent rewards.[28] Likewise, it is hard to imagine that formalized life story rights would reduce consumer confusion over

[23] Jorge L. Contreras, *The False Promise of Health Data Ownership*, 94 N.Y.U. L. REV. 624, 640-41, 646 (2019).

[24] U.S. CONST. art. I, § 8, cl. 8.

[25] Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163-64 (1995) ("[T]rademark law, by preventing others from copying a source-identifying mark, 'reduce[s] the customer's costs of shopping and making purchasing decisions,' for it quickly and easily assures a potential customer that this item — the item with this mark — is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past." (citing William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 267, 271-72 (1988))).

[26] *Id.* ("[Trademark] law thereby 'encourage[s] the production of quality products,' and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer's inability quickly to evaluate the quality of an item offered for sale.").

[27] *See, e.g.*, Coats v. Holbrook, 7 N.Y. Ch. Ann. 713, 717 (1845) (noting that a person may not imitate another's product to "attract to himself the patronage that without such deceptive use of such names . . . would have inured to the benefit of that other person" (discussed in BARTON BEEBE, TRADEMARK LAW: AN OPEN-SOURCE CASEBOOK 8 (4th ed. 2017))); *see also* Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1841 (2007) ("[T]rademark law, like all unfair competition law, sought to protect producers from illegitimate diversions of their trade by competitors.").

[28] *See* Lemley, *supra* note 10, at 1550 (finding no need for financial incentives to encourage the creation of individual information); Samuelson, *supra* note 10, at 1140 (finding that most people would likely wish to make their lives interesting without a property-based incentive to do so).

which individual they follow on social media or whose life story belongs to whom. At most, greater legal protection of the facts of one's life might encourage increased disclosure of such facts. However, the current torrent of personal testimonials via social media suggests that sufficient social and psychological rewards for such disclosures already exist for large segments of the population. Thus, despite superficial comparisons to other forms of intellectual property,[29] there are few legitimate instrumental rationales for the formal legal recognition of life story rights.

Rather than enhancing social welfare, the ever-increasing privatization of facts reduces overall welfare by eroding the public domain.[30] As one of us wrote more than a decade ago,

> One strain of property discourse invokes a libertarian vision of ownership as bulwark of individual liberty against state oppression and an efficient means of maximizing private wealth. But focusing exclusively on this ownership discourse of property ignores an alternative, social discourse that sees possession in a broader social context. From Roman roads to the English village green to the contemporary national park, the property relation has long taken the public writ large, and not just private individuals, as its subject. Ownership doesn't only recognize that greed is good, but also attends to the common good. A descriptively accurate and balanced use of property rhetoric — including intellectual property rhetoric — must take into account each of these traditions and their concomitant values.[31]

Over the years, the public domain has seen steady enclosure by legal rules and contractual restrictions, thereby limiting creative output,

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[29] *See, e.g.*, Stephanie J. Beach, *Fact & Fiction: Amending Right of Publicity Statutes to Include Life Story and Fictional Character Rights*, 42 SETON HALL LEGIS. J. 131, 133 (2017) ("The purpose of copyright is to provide an economic incentive for creators. The purpose of trademark is to prevent unfair competition or dilution. Should there not be a parallel for celebrity publicity?").

[30] *See infra* Part II.A.1 (discussing the public domain).

[31] David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 657 (2010); *see also* Lemley, *supra* note 10, at 1549 ("Facts and other fundamental building blocks from which creative works are built are central to the public domain.").

research, exploration, invention, and expression.[32] The recognition of private ownership in factual accounts would further constrain creative output and the dissemination of knowledge.

In this Article, we argue that the recognition of private property interests in life stories, and the concomitant erosion of First Amendment freedom of expression, is undesirable. Though it might redound to the advantage of parties to life story deals, it erodes the public domain in two ways. First, within the entertainment industry, many lawyers know that they are free to recount factual events, but still acquire life story rights because they fear litigation and potential liability under state rights of publicity, privacy, defamation, and other laws.[33] The specter of litigation thus leads producers to seek permission for expression that federal law should freely allow, effectively converting public information into private property. Second, the widespread perception that, regardless of law to the contrary, people possess an exclusive "life story right" independently pressures studios into making these agreements.[34] Here, too, producers forfeit the freedom they should have to tell reality-based stories due to social, rather than legal, pressures.

By acting in their mutual self-interest, producers and subjects create a negative public externality: subject matter that federal law seeks to preserve as part of the public domain is effectively, if not formally, converted to private property. The costs and benefits at issue here, and in any skirmish over the public/private divide in intellectual property, are not limited to the immediate parties to the deal. Practices like the life story acquisition that cordon off parts of the public domain exact systemic costs as well as local ones, and ignoring those systemic costs imperils the very system — the public domain — itself.

To ameliorate the trend toward private ownership of personal stories, we argue that Congress should enact a new federal statute barring states from enforcing right of publicity claims in the context of creative

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[32] *See* JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008).

[33] *See* Contreras & Fagundes, *supra* note 5, at 208-209.

[34] *See id.* at 194 (finding that some executives reported that they executed fewer life rights deals in part because they feared the bad optics of making an unauthorized docudrama).

productions such as films and television programs, so long as the names and images of private individuals are altered. While this protection may already exist to a degree under the First Amendment,[35] a clear statutory articulation of this rule at the federal level will prevent both misinterpretation of the law by lower courts and prevent state legislatures from enacting overly broad publicity statutes. The proposed federal statute will secure the status of facts as part of the public domain while leaving intact individual reputational and privacy interests. Moreover, an unequivocal legal signal that subjects have no economic interest in retelling their stories could push back against the lay perception that we each possess a bankable and exclusive "life story right" and the corollary pressure that this places on producers to acquire such rights before recounting these stories.

Removing the tension between rights of publicity and the public domain would likely allow more producers to create docudramas and similar creative output, thus enriching our lives. But the normative stakes of this issue extend beyond docudramas. Preserving the creative ecosystem sustained by the public domain — like the physical ecosystem sustained by environmental protection laws — requires taking seriously all threats to it. By the same token, our proposed limitation of the right of publicity would not curtail the legal protection of individuals' dignitary, reputational, and privacy interests already afforded by tort law.

The remainder of this Article proceeds as follows: In Part I, we first explore individual intuitions regarding ownership of factual life stories, then examine how the state law right of publicity and privately constructed life story acquisitions reify and perpetuate these intuitions. In Part II, we explore how the expanding "propertization" of life story narratives erodes the public domain and why that is harmful to creative production. In Part III, we propose the enactment of federal legislation expressly limiting the application of state rights or publicity laws to creative works. We then briefly conclude.

I. THE PRIVATIZATION OF LIFE STORIES

From the First Amendment to copyright law, it is blackletter law that facts — including the facts that comprise our life stories — are public

[35] *See infra* Part II.A.2.

property, free for all to use without payment or permission. Yet in an age when celebrities dominate the popular consciousness and many web platforms allow people to earn money by monetizing their personae, there is an ever-greater push toward allowing individuals to profit exclusively from their life stories. In this Part, we first trace the twin trends toward privatization of life stories: lay intuitions about self-ownership that are supercharged by the dominance of social media; and legal developments (transactional, judicial, and legislative) that threaten to imbue life stories with property-like qualities. We illustrate the point with the life story rights deal. In these deals, individuals "grant" the right to use their life stories to film and television studios seeking to make a docudrama about them. This practice at once reifies lay beliefs that individuals should own their life stories and entrenches legal developments that push in the direction of private control over those stories.

A. The Perception of Life Stories as Property

While many lawyers understand that facts, even the facts that comprise the narratives of our lives, are not forms of property, laypeople strongly believe otherwise. In this Subpart, we explain the lay or folk intuition that life stories are subject to property-like rights, particularly in the context of docudramas. We first trace the contours of popular instincts about ownership of identity generally, which have become more entrenched in the age of social media. We then show how these lay beliefs are particularly powerful with respect to life stories, illustrating the point by showing that people generally believe that film studios should not make fictionalized features about their lives without payment or at least permission.

1. Personae as Property

Elizabeth Taylor's famous statement, "I am my own commodity"[36] belies a basic human intuition that is at least as old as John Locke ("every man has a property in his own person: this nobody has any right

[36] LEWIN, *supra* note 1.

to but himself").[37] And while Locke was referring to physical human bodies, as well as "labour of his body, and the work of his hands",[38] it is no great stretch to extend this preoccupation with ownership to one's persona and the events that constitute one's life story.[39] Taylor's lay intuition that her identity is a commodity that she possesses and controls is a modern instantiation of Locke's proposition that the legal institution of property begins with and flows from ownership of the self.

Lay intuitions or folk beliefs about property are not the sole province of celebrities. Scholars have observed that whatever the law may dictate about the contours of ownership, "ordinary people" have deeply felt instincts about what constitutes property, irrespective of, and sometimes contrary to, substantive law.[40] Other observers have argued that an innate sense of an individual's entitlement to "own" things runs deep in Western culture and extends to intangible as well as tangible things.[41] As one of us has previously commented, the idea of property has a powerful hold on the public consciousness, observing a deep "sense of connection between 'property' as it is popularly understood and instinctive notions of both personal identity and the inviolability of ownership."[42] Psychological studies find that, even at an early age, individuals have strong intuitions about the ownership of intellectual

[37] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 (1689).

[38] *Id*.

[39] *See* Michelle E. Lentzner, *My Life, My Story, Right — Fashioning Life Story Rights in the Motion Picture Industry*, 12 HASTINGS COMMC'NS & ENT. L.J. 627, 645 (1990) (suggesting that legal protection of life stories could be based on effort expended by a subject in living her life). According to some scholars, Locke's labor-based theories form the foundation for intellectual property law, involving creations of the mind. *See* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 34-48 (2011).

[40] Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY: NOMOS XXII 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980) ("In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person."); *see also* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 97-100, 113-67 (1977) (remarking on specialist versus lay conceptions of property).

[41] *See, e.g.*, STEPHANIE M. STERN & DAPHNA LEWINSOHN-ZAMIR, THE PSYCHOLOGY OF PROPERTY LAW 25 (2020) (possession extends to intangible entitlements); Samuelson, *supra* note 10, at 1130 ("It may seem natural for individuals to assume that they do or should own data about themselves.").

[42] Fagundes, *supra* note 31, at 655-56.

production and ideas.[43] And, as Taylor suggests, these deeply held folk notions of ownership also extend to the self.[44]

Beginning in the 1980s, analysts began to observe the importance that individuals place on their personal histories and the critical role that those histories play in the formation of self-identity. Noted neurologist Oliver Sacks theorized, for example, that "each of us constructs and lives a 'narrative,' and that this narrative is us, our identities."[45] Cognitive psychologist Jerome Bruner similarly wrote that "we become the autobiographical narratives by which we 'tell about' our lives".[46] And in the 1990s, Dan McAdams founded the subdiscipline of "[n]arrative psychology" centered on "[t]he development of a life-story model of human identity."[47]

[43] *See* Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261, 306 (2014) ("Six-year-old . . . children make negative moral evaluations of those who plagiarize the work of others versus those who produce unique works. These judgments indicate an understanding that others have differentiated ideas and that copying those ideas is problematic, at least in certain contexts. . . . Further studies have found that children value the contribution of ideas to an artistic endeavor more than the contribution of labor."); *see also* PASCAL BOYER, MINDS MAKE SOCIETIES: HOW COGNITION EXPLAINS THE WORLD HUMANS CREATE 186 (2018) (proposing a model of ownership psychology); Jeffrey Evans Stake, *The Property "Instinct*," 359 PHIL. TRANSACTIONS 1763, 1763 (2004).

[44] In a recent collection of stories, Lionel Shriver explores lay attitudes and expectations toward property. One of her characters, an American journalist living in Belfast, develops the sense that she "owns" her unique status as a foreigner interpreting local events in Northern Ireland. "Ownership", she reflects, "is as much state of mind as legal entitlement." LIONEL SHRIVER, PROPERTY: STORIES BETWEEN TWO NOVELLAS 264 (2018); *see also* Jorge L. Contreras, *Getting Real, Getting Personal: Fictions and Realities of Property Across Borders*, 45 FORDHAM INT'L. L.J. 639 (2022) (book review) (discussing property intuitions in recent works of fiction).

[45] OLIVER SACKS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES 110 (1985).

[46] Jerome Bruner, *Life as Narrative*, 54 SOC. RSCH. 11, 15 (1987).

[47] *Dan McAdams*, NW. UNIV.: DEP'T OF PSYCH., https://psychology.northwestern.edu/people/faculty/core/profiles/dan-mcadams.html (last visited Feb. 8, 2023) [https://perma.cc/YH2G-9HSY]. Professor McAdams's books include DAN P. MCADAMS, POWER, INTIMACY, AND THE LIFE STORY: PERSONOLOGICAL INQUIRIES INTO IDENTITY (1985), DAN P. MCADAMS, THE STORIES WE LIVE BY: PERSONAL MYTHS AND THE MAKING OF THE SELF (1993), DAN P. MCADAMS, THE REDEMPTIVE SELF: STORIES AMERICANS LIVE BY (2006).

2. The Impact of Social Media

While the intuition that we own our identities has deep roots, it has been supercharged in recent decades by the internet, which has expanded access to, and the value of, personae to a heretofore unimaginable degree. As recently as the mid-2000s, the number of people who could plausibly claim to have a valuable identity was limited to stars like Taylor Swift and Tom Cruise. Celebrities were few, and access to them remained limited. While ordinary people were sometimes thrust into the limelight, whether from becoming the victim of a crime, winning the lottery, or rescuing a stranded puppy, the resulting "fifteen minutes of fame," while gratifying and ego-enhancing, seldom resulted in lasting fame or significant financial gain.

The rise of social media in the last decade-plus, however, has exploded this traditional understanding of celebrity. While the circle of famous people used to be small and entry into it mysterious and difficult, any person with a smartphone today has a shot at becoming a celebrity.[48] Social media platforms like Twitter, Instagram, and TikTok enable users to generate potentially huge followings, which often translate into identity brands.[49] For example, in *Fraley v. Facebook, Inc.*, the district court declined to dismiss a right of publicity claim based on the plaintiffs' celebrity status among their Facebook "friends."[50] With increased routes to celebrity, the number of famous people has correspondingly skyrocketed. While not every social media personality becomes a traditional star in the manner of Justin Bieber or Magic

[48] Ironically, a number of recent docudramas and documentaries revolve around the pervasive (and negative) influence of social media platforms. These include FYRE FRAUD (Hulu 2019); INVENTING ANNA (Netflix 2022); and THE TINDER SWINDLER (Netflix 2021).

[49] *See generally* Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 89-93 (2020) (describing phenomena of influencer marketing, including "micro- and "nano-influencers").

[50] Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 804-05, 808 (N.D. Cal. 2011) (noting that even limited celebrity status could generate "commercially exploitable opportunities"); *see* Graeme B. Dinwoodie & Megan Richardson, *Publicity Right, Personality Right, or Just Confusion?*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT 425, 438 (Megan Richardson & Sam Ricketson eds., 2017) (discussing *Fraley*); *id.* at 428 ("[T]he category of who may be a celebrity seems to be expanding, with the result that protection once largely confined to a relatively small elite group is now closer to a mainstream right.").

Johnson, many thousands of otherwise ordinary users have cashed in on being "internet famous" to earn a meaningful income via sponsorships and branding.[51]

The recent prevalence of individuals leveraging their identities into sources of income amplifies the lay intuition that we own our life stories.[52] Laypeople and lawyers often embrace the proposition "if value/then right," which holds that "wherever value is received, a legal duty to pay arises, regardless of whether imposing that legal duty serves public welfare."[53] The amount of money generated by social media platforms is staggering, and much of that is due solely to the identities of the personalities who popularize and bring users to those platforms.[54]

Scholars such as Wendy Gordon emphasize, however, that "if value, then right" is a fallacy, since not every value-generating act derives from a legally enforceable right.[55] But her point is that this intuition drives lay perceptions of how ownership should work, regardless of blackletter law to the contrary.[56] And in a world where people can garner attention and earn money simply by hitting the retweet button or sending a happy

[51] *See* Roberts, *supra* note 49, at 92 (describing online influencers as "earning enough from sponsored content to make a living or justify the time invested in a side hustle").

[52] BRUCE GILLEY, THE RIGHT TO RULE: HOW STATES WIN AND LOSE LEGITIMACY at xii (2009) ("Nothing will turn heads like the cry of 'legitimacy crisis.' That cry, where it is a true reflection of citizen beliefs, will corrode the power of a ruler beyond what legions of soldiers or crates of gold can restore. A lot is riding on the question of legitimacy.").

[53] Alfred C. Yen, *Brief Thoughts About if Value/then Right*, 99 B.U. L. REV. 2480, 2480 (2019) (quoting Wendy Gordon). The "if value, then right" proposition was first identified in print by Rochelle Dreyfuss in the context of trademark law. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405-06 (1990).

[54] Annual revenue for the U.S. social networking industry in 2022 was approximately $82 billion. BRIGETTE THOMAS, IBISWORLD INDUSTRY REPORT OD4574 — SOCIAL NETWORKING SITES IN THE US 6 (2022). In 2022, the "influencer" industry was reported to represent $16 billion in revenue. Fine F. Leung, Jonathan Z. Zhang, Flora F. Gu, Yiwei Li & Robert W. Palmatier, *Does Influencer Marketing Really Pay Off*?, HARV. BUS. REV. (Nov. 24, 2022), https://hbr.org/2022/11/does-influencer-marketing-really-pay-off [https://perma.cc/7J8U-86VL]. According to one widely cited 2015 study, businesses make $6.50 for every dollar they spend on influencer marketing. *Influencer Marketing Study,* TOMOSON, https://www.tomoson.com/blog/influencer-marketing-study/ (last visited Aug.19, 2023) [https://perma.cc/ARX5-84NM]; *see also* Roberts, *supra* note 49, at 83-84.

[55] Yen, *supra* note 53, at 2480-81.

[56] *Id*.

anniversary message to a stranger, it is understandable that laypeople would come to feel ever more strongly that they own their personae — including the facts that comprise their life stories.

3. Appropriation of Personal Stories — The Bad Art Friend and Friends

A striking indicator of the popular leaning toward ownership of the self can be found in a series of recent disputes, or at least anxieties, over the alleged use of personal events in putative works of fiction. The first of these to gain widespread attention appeared in a 2019 *New Yorker* article by Katy Waldman.[57] Waldman describes an earlier essay about the eating disorder *anorexia nervosa* that she based on her own and her sister's childhood experiences. In the essay, Waldman referred to a book on anorexia. She was then contacted by the author of the book who claimed that Waldman had "annexed the themes" of the book with inadequate citation.[58] A few years later, Waldman encountered another book, a fictionalized biography of J. Robert Oppenheimer, that included characters that bore striking resemblances to herself and her sister. After Waldman inquired, the author admitted that she had read Waldman's essay and "enjoyed" it.[59] These related experiences of appropriating and being appropriated caused Waldman to ask "who owns a story?"[60] Waldman is alternately angered and elated by the appropriation of her story. She explains,

> Being appropriated by a person, like being appropriated by a mental illness, feels flattering and violating and queasy and riveting and boring. I did not know this until it (maybe) happened to me, but my family has known it for at least four years, because I (definitely) did it to them.[61]

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[57] Katy Waldman, *Who Owns a Story?*, NEW YORKER (Apr. 17, 2019), https://www.newyorker.com/books/under-review/who-owns-a-story-trust-exercise-susan-choi [https://perma.cc/298S-9VRZ].

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

Despite Waldman's openness about story appropriation, others have been less accepting. For example, in July 2021, a young woman wrote an article in *Slate* describing her hurt and confusion upon recognizing numerous details about a soured relationship of her own in a popular short story titled "Cat Person."[62]

A few months later, a *New York Times Magazine* story detailed the ongoing dispute and litigation between a woman who donated one of her kidneys to an unknown recipient and a Facebook "friend" who then used the donation as the premise for a short story.[63] While the story used fictional characters, dialog and events (and thinly-disguised portions of a letter the original donor posted on Facebook), the donor became incensed that the author never acknowledged that her experience inspired the short story.[64] The article explains, "[t]his wasn't about art anymore; not [the author's] anyway. It was about her art, her letter, her words, her life."[65]

The common thread in these accounts is the use of real people and events in fictional stories, and the subjects' sense that something of *theirs* — something they own — has been taken. That something is their story. None of these accounts, all of which appeared in leading general interest publications, mention the First Amendment, the right of publicity, the right of privacy, or any other legal issue (other than, in the case of the kidney donor, the potential infringement of the copyright in a letter posted to Facebook).[66] These articles are not legal analyses, and have very little to do with the law, but everything to do with individual perceptions of ownership and control over experienced events, and in particular, individuals' life stories.

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[62] Alexis Nowicki, "*Cat Person*" *and Me*, SLATE (July 8, 2021, 5:45 AM), https://slate.com/human-interest/2021/07/cat-person-kristen-roupenian-viral-story-about-me.html [https://perma.cc/9H7F-RXN2].

[63] Robert Kolker, *Who Is the Bad Art Friend*?, N.Y. TIMES (last updated June 15, 2023), https://www.nytimes.com/2021/10/05/magazine/dorland-v-larson.html [https://perma.cc/V2MK-8AZG].

[64] *Id*.

[65] *Id*.

[66] A federal district court held that the author's use of the kidney donor's Facebook post in her short story "The Kindest" constituted a fair use under the Copyright Act. Larson v. Perry, Civ. Action No. 1:19-cv-10203-IT, 2023 U.S. Dist. LEXIS 163833 at *30 (D. Mass. Sept. 14, 2023).

4. Property Intuitions and the Docudrama

The widely held intuition that we own property-like rights in our life stories finds salient expression in one increasingly popular cultural vehicle: The docudrama. Docudramas are part documentary (because they are rooted in true stories) and part drama (because they are substantially fictionalized to enhance their narrative elements). The docudrama's roots can be traced back to the inception of popular film in the early years of the twentieth century.[67] By the 1980s, televised "movie of the week" fare increased the profile of this dramatic form, and in the last decade it has become one of the most popular genres for films and streaming series.[68] Recent docudramas have fictionalized the lives of musicians (*Ray*, *Rocket Man, Bohemian Rhapsody*), fashion icons (*Halston*, *House of Gucci*), sports stars (*King Richard, Winning Time*), serial killers (*Ted Bundy: American Boogeyman, No Man of God*, *Dahmer — Monster: The Jeffrey Dahmer Story*), business titans (*The Social Network, WeCrashed*), and social media sensations (*Inventing Anna*).

Docudramas are undeniably popular fare.[69] Numerous reasons have been offered for why audiences respond so well to this entertainment genre. In some cases, viewers may enjoy the retelling or "reprocessing" of recent events in a manner that humanizes and simplifies otherwise complex occurrences.[70] In other cases, viewers may wish to learn facts or gain insights into the personalities of their favorite musical groups, sports heroes, or political leaders.[71] Similar factors may be at work in the many docudramas that focus on criminal behavior — while viewers may

[67] *See infra* Part I.B.2 (discussing history of the right of publicity).

[68] *See* Contreras & Fagundes, *supra* note 5, at 177-78 n.106–08 (collecting sources).

[69] The popular obsession with "true crime" series and podcasts is exemplified by the 2023 streaming series "Based on a True Story" — the premise of which surrounds the producers of such a series based on a real-life serial killer. BASED ON A TRUE STORY (Peacock, 2023).

[70] *See* GEORGE W. BRANDT, BRITISH TELEVISION DRAMA IN THE 1980S, at 5 (1993); *see also* ALAN ROSENTHAL, WHY DOCUDRAMA? FACT-FICTION ON FILM AND TV 6 (1999) (linking revival in interest in docudramas to the 1970s Watergate scandal and American Bicentennial).

[71] Emma Perot, The Interaction of the Influences of Law, Contract, and Social Norms on the Commercialisation of Persona: A Comparative Empirical Study of The United Kingdom and the United States of America 192 (2020) (Ph.D. dissertation, King's College London).

be aware of the facts surrounding a recent string of killings, gaining insight into the psychology of the killer can be both titillating and educational.[72] In sum, docudramas are popular *because* they are based on true events, and it is likely that entirely fictional dramas depicting similar (but fictitious) characters would have less popular appeal.

Popularity aside, docudramas serve a larger social purpose than entirely fictional dramas. While they may fictionalize and dramatize parts of a story for narrative effect, they do, in the end, convey factual information to the public. It is likely that more people today know more about Mauricio Gucci, Richard Williams, Ted Bundy, and Mark Zuckerberg than they otherwise would have absent the popular recent docudramas about these figures.[73] This knowledge fosters increased public understanding of a range of contemporary issues from business to parenting to criminal justice and its reform. What's more, some types of stories simply cannot be told compellingly outside the docudrama genre. Writer-producer Leslie Woodhead points to recent military invasions, ecological disasters, and mass casualties as "dramas of crucial public concern and interest" that require the humanizing and narrative gloss of the docudrama come alive for a wide viewership.[74] Public education of this nature is a social good, and while docudramas are not news programs or documentaries, and surely convey less accurate and complete information than these other forms of media,[75] they are consumed by far more people and thus serve a valuable public function.[76] In fact, in the view of some directors and producers, their

[72] *See* ROSENTHAL, *supra* note 70, at 6.

[73] As John Aquino notes, "[i]n the case of a historical event, a widely shown movie based on that event may be the last word on the subject for a very long time." JOHN T. AQUINO, TRUTH AND LIVES ON FILM: THE LEGAL PROBLEMS OF DEPICTING REAL PERSON AND EVENTS IN A FICTIONAL MEDIUM 4 (2d ed. 2022) (citing Sumiko Higashi, Walker *and* Mississippi Burning*: Postmodernism Versus Illusionist Narrative*," *in* REVISIONING HISTORY: FILM AND THE CONSTRUCTION OF A NEW PAST 198 (Robert A. Rosenstone ed., 1995)).

[74] ROSENTHAL, *supra* note 70, at 6-7.

[75] *See* AQUINO, *supra* note 73, at 1-5 (citing numerous inaccuracies in Hollywood docudramas).

[76] We thus disagree with the arguments of critics who oppose the docudrama as a genre due to its incompleteness and inaccuracy. *See* ROSENTHAL, *supra* note 70, at 7-8 (quoting, for example, Walter Goodman of the *New York Times*, who is reported as saying

alterations can actually make a story more true, or at least truer to its essence.[77]

Docudramas also exemplify the extent to which laypeople view their life stories as commodities. The industry insiders that we interviewed for an earlier article reported that subjects of potential docudramas have an expectation that studios pay them for using their life stories, often at an exorbitant rate.[78] One executive attributed this expectation to the ability of those subjects to translate their identities into profit via social media. He noted that it is "shocking" for subjects to learn that someone can "monetize your personality . . . without collecting any money," since social media regularly allows them to do so.[79]

Here, too, the "if value/then right" fallacy is at work. Thanks to their popularity, docudramas can earn large sums for production companies. But they cannot do so without leveraging true facts that inevitably include details from real people's lives. Because individuals portrayed in docudramas predict that their life story facts will generate significant value for a studio, they wrongly infer that they must be compensated for those facts.

Subjects of docudramas also regard the events and facts of their life stories as property-like in the sense that they believe studios should secure their permission before telling those stories. For a dramatic illustration, consider the recent dispute between the Hulu network and Mike Tyson. In 2022, Hulu released "Mike," a docudrama about the famous boxer.[80] The network did not seek Tyson's blessing or even

"the only good docudrama is an unproduced docudrama" and Jerry Kuehl, who argues that "docudrama should always be avoided where documentary is possible").

[77] *See* AQUINO, *supra* note 73, at 5 (In an interview, Wolfgang Petersen, director of the film *A Perfect Storm*, was asked, "[s]o we tell a greater truth if we exaggerate or distort the actual facts?" to which he replied, "[a]bsolutely, absolutely").

[78] Contreras & Fagundes, *supra* note 5, at 194-95.

[79] Anonymous interview #5 conducted for Contreras & Fagundes (on file with author), *supra* note 5, at 5.

[80] Frank Pallotta, *Mike Tyson Slams Hulu's New Series About Him: "They Stole My Life Story,"* CNN BUS. (Aug. 8, 2022, 1:32 PM EDT), https://www.cnn.com/2022/08/08/media/mike-tyson-hulu-series/index.html [https://perma.cc/XBJ2-CJE3]. As this controversy unfolded, Hulu defended its failure to acquire Tyson's life story by stating that it understood his rights already to have been acquired by another studio. Philiana Ng, "*Mike*" *Producers Defend Hulu Series Amid Mike Tyson's Criticisms*, ET (Aug. 4, 2022, 1:32

notify him before starting production. Shortly before the film's release, Tyson became aware of the series and expressed outrage at Hulu's making the project without his authorization. He publicly railed against Hulu's theft of celebrity life rights,[81] and compared the network's unlicensed use of his persona to slavery.[82] An outpouring of public support for Tyson followed. Observers voiced or tweeted their indignation at Hulu, threatening to boycott the platform because it had exploited Tyson's life story without his permission.[83] Nowhere in this controversy did anyone note that studios are by law free to make docudramas without a subject's authorization. And therein lies our point: lay intuitions about ownership of life story facts are strong, even though those facts do not comprise property as a matter of law.

B. The Right of Publicity and Legal Ownership of Life Stories

Lay perceptions about ownership are, of course, not enforceable as law, and in this case run directly counter to the fundamental legal proposition that facts are part of the public domain. But as we show in this Subpart, the gravitational force exerted by the lay view that life facts should be private property has slowly begun to bend law in that direction. We illustrate the point by examining in more detail the widespread Hollywood practice of acquiring life story rights by contract. We then show, in Part II, that this practice has combined with the expansion of right of publicity law to convert life story facts from public domain material into something akin to private property.

PM PDT), https://www.etonline.com/mike-producers-defend-hulu-series-amid-mike-tysons-criticisms-188586 [https://perma.cc/H2V7-RZPD].

[81] *See* Mike Tyson (@MikeTyson), TWITTER (Aug. 6, 2022, 9:07 AM), https://twitter.com/MikeTyson/status/1555948701012488193 [https://perma.cc/58EH-B7SM] [hereinafter TWITTER]; *see also* Mike Tyson (@miketyson), INSTAGRAM (Aug. 6, 2022), https://www.instagram.com/p/Cg7JRAeLY9B/ [https://perma.cc/PF2X-J9X5] [hereinafter INSTAGRAM].

[82] Tyson tweeted that Hulu could not "sell [him] on the auction block." Tyson, TWITTER, *supra* note 81; *see also* Tyson, INSTAGRAM, *supra* note 81.

[83] To take just one of many examples, one user tweeted, "I really wanted to see that Mike Tyson thing on Hulu but I just can't watch it knowing he wasn't compensated or consulted." Shvonne Latrice (@SiobhanNoir), TWITTER (Aug. 6, 2022, 12:15 PM), https://twitter.com/SiobhanNoir/status/1555995879311417344?s=20&t=lZ17fvrwHDFNSb_6ZqHADw [https://perma.cc/64ME-48T4].

1. The Expanding Right of Publicity

The right of publicity is a state law construct that enables individuals to recover a share of the economic value created when their identities are used without consent.[84] Thus, unlike claims for defamation and invasion of privacy, and more like copyright and trademark, this cause of action seeks predominately to advance a plaintiff's financial rather than dignitary interests.[85]

The right of publicity, which is codified in the statutes of twenty-four states[86] and exists under common law in others, is notoriously fragmented.[87] It is broadly construed in many jurisdictions, more narrowly in others, and some states recognize no right of publicity at all. In terms of scope, some states extend the right of publicity to all people, while others limit it to public figures; some apply it only to the deceased while others apply it only to the living.[88]

Amid this disarray, one thing is clear: The right of publicity continues to expand.[89] It was once used almost exclusively to prevent unauthorized uses of individual personae in commercial settings. Hence Johnny Carson's successful right of publicity claim against a company that sought to brand a portable toilet with his famous tagline "Here's Johnny!,"[90] and singer Bette Midler's successful publicity claim against

[84] *See* Restatement (Third) of Unfair Competition § 46 (Am. L. Inst. 1995).

[85] This was not always the case. As Jennifer Rothman has illustrated, the right of publicity and the right of privacy share a common heritage and are used to vindicate similar interests. The emergence of a distinct right of publicity giving individuals a property-like interest in their personae emerged only when the two causes of action diverged during the mid/late twentieth century. *See* JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY 11-44 (2018) (showing the shared origin of these causes of action in the early twentieth century).

[86] Fifty-state survey conducted by the authors on Jan. 23, 2023, using Jennifer E. Rothman, *Rothman's Roadmap to the Right of Publicity*, RIGHT OF PUBLICITY ROAD MAP, https://rightofpublicityroadmap.com (last visited Jan. 23, 2023) [https://perma.cc/CG7W-6243] [hereinafter *Roadmap*].

[87] *See* ROTHMAN, *supra* note 85, at 96-98 (describing the patchwork of U.S. rights of publicity as "the state(s) of disarray").

[88] *See* Rothman, *Roadmap*, *supra* note 86 (analyzed by the authors).

[89] ROTHMAN, *supra* note 85, at 87 (explaining that after the Supreme Court's decision in *U.S. v. Zacchini*, "the right of publicity has proliferated across the United States and increasingly across the globe, and expanded in its breadth").

[90] Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).

Ford Motor Company, which used a voice impersonator to sing one of her most famous songs in a car commercial.[91] In its more expansive iterations, though, the right of publicity can be extended not only to unauthorized product promotions, but to expressive works.[92] And while the right of publicity conceptually remains a tort, courts have begun to imbue it with property-like characteristics such as transferability and heritability.[93]

a. The First Right of Publicity Laws

In the late nineteenth century, a backlash grew against the use of images of private individuals, particularly women, on product packaging and advertising.[94] In 1888, a bill was introduced in Congress to prohibit the unauthorized use of female likenesses, portraits, or representations for advertising purposes,[95] and in 1890 Samuel Warren and Louis Brandeis published their famous law review article advocating the recognition of a "right to privacy,"[96] a right that clearly encompassed the public exploitation of one's persona.[97] This trend culminated in the first American right of publicity law, New York's 1903 "Act to Prevent the Unauthorized Use of the Name or Picture of Any Person for the

[91] Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[92] Consider, for example, the Restatement's broad framing of the right of publicity as arising whenever someone "appropriates the commercial value of a person's identity by using without consent a person's name, likeness, or other indicia for purposes of trade[.]" RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. L. INST. 1995); *see also* ROTHMAN, *supra* note 85, at 3 (observing that many states' rights of publicity appear to extend to "virtually any use of a person's identity, including use in news, movies, books, video games, and political campaigns").

[93] In California, for example, the right of publicity can be transferred, inherited by the beneficiaries of one's estate, and lasts for 70 years after the owner's death. CAL. CIV. CODE § 3344.1(b), (g) (2012); *see also* ROTHMAN, *supra* note 85, at 116-122 (discussing transferability of right of publicity) and 123 (discussing postmortem rights and heritability). *But see* James v. Delilah Films, Inc., 544 N.Y.S.2d 447, 451 (N.Y. Sup. Ct. 1989) (right of publicity does not survive owner).

[94] *See* ROTHMAN, *supra* note 85, at 17.

[95] *Id.* (quoting H.R. 8151, 50th Cong. (1888)).

[96] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[97] *See* ROTHMAN, *supra* note 85, at 31.

Purposes of Trade."[98] This 1903 statute made it a misdemeanor to use an individual's "name, portrait or picture" in trade without that person's prior written consent.[99]

This and other early state laws were framed as "right of publicity" statutes but operated more as protections of individual privacy, akin to what is now known as the tort of public disclosure of private facts.[100] They sought less to secure a property-like right in identity and more to prevent people from the reputational and dignitary costs of having their personae exploited publicly without their consent. The Second Circuit's 1953 decision in *Haelan Laboratories v. Topps Chewing Gum* is commonly believed to have created a new property-like right of publicity from the preexisting right of privacy.[101] In *Haelan*, the court held that "in addition to and independent of that right of privacy[], a man has a right in the publicity value of his photograph."[102] In recent work, Jennifer Rothman has shown that despite this dictum, *Haelan* did not establish a broad property-like right of publicity, and that even if the case did suggest that New York had a common-law right of publicity, that holding was soon overturned by New York courts.[103]

b. Publicity as a Property Right

Regardless of this misreading, courts, commentators, and lawyers in the ensuing decades leaned on *Haelan* for the proposition that the right

[98] Act of Apr. 6, 1903, ch. 132, 1903 N.Y. Laws 308 (codified at N.Y. CIV. RIGHTS LAW §§ 50, 51 (1909).

[99] *Id.*

[100] *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1976). Not all jurisdictions recognize the tort of public disclosure of private facts. *See, e.g.*, Freihofer v. Hearst Corp., 480 N.E.2d 349, 353 (N.Y. 1985) (finding no independent claim for invasion of privacy beyond statutory right); Hall v. Post, 372 S.E.2d 711, 717 (N.C. 1988) ("We conclude that any possible benefits[...]are entirely insufficient to justify adoption of[...]the invasion of privacy tort which punishes defendants for the typically American act of broadly proclaiming the truth by speech or writing.")

[101] *See* Haelan Labs. v. Topps Chewing Gum, 202 F.2d 866, 867-69 (2d Cir. 1953); ROTHMAN, *supra* note 85 at 199-200 n.1 (cataloging long list of scholars who cite *Haelan* as the progenitor of the modern right of publicity).

[102] *Haelan Labs.*, 202 F.2d at 868-69.

[103] *See* ROTHMAN, *supra* note 85, at 63-64 (summarizing the argument that *Haelan* itself does not provide a valid legal basis for the modern right of publicity).

of publicity included an exclusive interest in a person's identity in addition to protecting that person's dignitary interests.[104] And, by the late twentieth century, the right of publicity had expanded considerably to take on the breadth and substantive indicia of property. For example, in 2001, the California Supreme Court held, in upholding a publicity claim against a t-shirt design depicting the Three Stooges comedy trio, that "[t]he right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility."[105]

Many courts and, later, legislatures have added indicia of property to the right of publicity, including by making the right posthumous, so that (unlike privacy torts and defamation) it can be inherited as part of one's estate.[106] Similarly, a number of jurisdictions treat rights of publicity (again, like physical property but unlike defamation or privacy torts) as transferable.[107] Selling one's right of publicity means not only that the transferee can profit from uses of the transferor's identity but also that the transferee may control what uses the transferor (i.e., the original subject of the right) may make of it, severely limiting their personal autonomy.[108] For example, a recent ESPN documentary about the *American Gladiators* show revealed that one of the show's co-creators, Johnny Ferraro, acquired the life story rights of his co-creator, Dann Carr, and used this acquisition in an attempt to prevent Carr from participating in the documentary (and presumably casting Ferraro in a negative light).[109]

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[104] *Id.* at 64.

[105] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804 (Cal. 2001).

[106] Early cases were conflicted over whether the right of publicity was descendible. *Compare* Lugosi v. Universal Pictures, 603 P.2d 425 (Cal. 1979) (rejecting a posthumous right of publicity), with *id.* at 441 (Bird, C.J., dissenting) (advocating a posthumous right of publicity). But even states like California and Tennessee whose courts initially rejected a posthumous right of publicity eventually found themselves overruled by state laws to the contrary, and now rights of publicity often carry heritability provisions. *See, e.g.*, Allen Toussaint Legacy Act, LA. STAT. ANN. § 470.1 (2022) (creating a right of publicity that extends 50 years after the subject's death); ROTHMAN, *supra* note 85, at 123-24 ("[M]any states allow some form of publicity rights to transfer upon death.").

[107] ROTHMAN, *supra* note 85, at 5-6.

[108] *See* ROTHMAN, *supra* note 85, at 128-31; Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 229 (2005).

[109] *30 for 30: The American Gladiators Documentary* (Vice Studios 2023) (episode one). Surprisingly, in episode two Carr does appear despite Ferraro's apparent acquisition of

The treatment of the right of publicity as a property right raises a host of surprising and even perverse implications. The breadth of the right has allowed plaintiffs to recover even when their identity is only vaguely invoked rather than explicitly portrayed, as when game show hostess Vanna White successfully sued Samsung Electronics for airing a commercial that featured an ersatz robot wearing a blonde wig.[110] Parents have assigned away their minor children's rights in images of them, abdicating any control over those images, even if the children later find the images upsetting.[111] And the foundation that controls the publicity rights of Rosa Parks sued Target when it discovered that the store was selling plaques honoring the deceased civil rights hero.[112] This expanded, property-like right of publicity has created a doctrinal basis for subjects of docudramas to claim that they own the facts of their life stories, which we explore in the ensuing Subsection.

2. The Right of Publicity and Docudramas

The connection between the right of publicity and the docudrama is a close one. Docudramas have since the early days of Hollywood been popular and profitable. Because they recount true stories, they invariably depict real people (albeit in more or less fictionalized settings). And because people have deep rooted intuitions that uses, especially public, for-profit uses, of their identities should be subject to permission and payment, it is unsurprising that subjects of these productions would invoke the right of publicity against studios that made unauthorized docudramas about them. This was borne out by early actions under the New York statute, which involved unauthorized

his life story rights. There is no explanation of this anomaly in the documentary. One possibility is that Ferraro consented to allow Carr to be interviewed.

[110] White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1993).

[111] *See* Faloona *ex rel.* Fredrickson v. Hustler Mag., 799 F.2d 1000, 1007 (5th Cir. 1986); ROTHMAN, *supra* note 85, at 121 (discussing how Brooke Shields' mother transferred Shields' rights in certain images when she was a minor, making Shields unable to control those images upon becoming an adult). *But see* Stacey Dogan, *Stirring the Pot: A Response to Rothman's Right of Publicity*, 42 COLUM. J.L. & ARTS 321, 326-27 (2019) (challenging Rothman's analysis re. assignment of rights).

[112] Ultimately, the Foundation lost. Rosa & Raymond Parks Inst. for Self-Dev. v. Target Corp., 812 F.3d 824, 832 (11th Cir. 2016). A smaller retailer or individual without the resources to defend the lawsuit likely would have had to settle.

reproductions of photographic images of individuals in documentary news reels.[113] But it was not until the *Binns* case in 1913[114] that the New York statute was applied to the dramatized use of an individual's identity in a film.

a. From Binns *to* Spawn*: Early Docudrama Cases*

John R. ("Jack") Binns was the telegraph operator on the steamship *Republic*.[115] When the *Republic* collided with another vessel, Binns dispatched a telegraphic distress signal that led to the rescue of the *Republic*'s passengers and crew.[116] Shortly after the rescue, Vitagraph produced a short film reenacting the dramatic event using actors and stage sets.[117] Though Binns's image did not appear in the film (the typical complaint in privacy suits prior to that time), the film used Binns's name. In response to Binns's suit under the New York statute, Vitagraph argued that the rescue of the *Republic* was a factual account, and that its film was no different than a news reel conveying information about actual people and events.[118] In ruling for Binns, however, the court reasoned that, unlike a news reel, Vitagraph used Binns's story and name in trade "to amuse those who paid to be entertained."[119] Given that the statute prohibited unauthorized uses of individual names in trade, Binns's challenge was successful.[120]

Binns sought only to prevent further distribution of the film, not a share of the profits it earned. His claim was thus more in the nature of protecting his privacy interests than an assertion rooted in ownership of his life story facts. Nevertheless, more than a century later, the 1903 statute remains in force in New York, suggesting that even a modern

[113] *See* LOUIS D. FROHLICH & CHARLES SCHWARTZ, THE LAW OF MOTION PICTURES, INCLUDING THE LAW OF THE THEATRE 274-78 (1918) (collecting cases); ROTHMAN, *supra* note 85 at 31-35.

[114] Binns v. Vitagraph Co. of Am., 103 N.E. 1108 (N.Y. 1913).

[115] *Id.* at 1108.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* at 1111.

[120] *Id.* at 1109.

plaintiff could successfully sue for unauthorized use of their life story facts in a film.

As the breadth of the right of publicity has expanded and docudramas have made a resurgence, other plaintiffs have invoked the contemporary, property-like right of publicity to recover a share of the revenue generated by nonconsensual uses of their identities. One of the first such suits involved a comic book, not a film. In the late 1990s, Canadian artist Todd McFarlane created *Spawn*, a superhero horror-fantasy series.[121] One of the characters in *Spawn* was a mob enforcer named Antonio "Tony Twist" Twistelli, which McFarlane based on Tony Twist, a St. Louis Blues wingman known as an "enforcer" of a different kind: a hockey player whose primary job is to start and win fights.[122] The real life Twist objected to McFarlane's unauthorized use of the details of his professional life, albeit fictionalized, and sued under Missouri's broad right of publicity statute.[123] After years of litigation, including a trip to the Missouri Supreme Court, Twist prevailed and won a judgment of $15 million.[124] While it does not involve a docudrama, Twist's case did create a favorable precedent for plaintiffs under the right of publicity.

b. Evolving Judicial Understanding of the Right of Publicity

Plaintiffs have had less success in recent federal and state cases arising in California. In *Sarver v. Chartier*,[125] Sergeant Jeffrey Sarver, the bomb defusing expert on whom the Oscar-winning film *The Hurt Locker* was based, sued the film's creators, alleging among other things a violation of his right of publicity. The Ninth Circuit rejected Sarver's claim on the theory that films and television shows contain expressive

[121] Doe v. TCI Cablevision, 110 S.W.3d 363, 365 (Mo. 2003).

[122] *Id.* at 366. McFarlane's use of Twist's name and persona for his fictional character was not coincidental. As McFarlane admitted in an interview, "[t]he Mafia don . . . is named for former Quebec Nordiques hockey player Tony Twist, now a renowned enforcer (i.e. "Goon") for the St. Louis Blues of the National Hockey League." *Id.* at 367.

[123] *Id.* at 365.

[124] Doe v. McFarlane, 207 S.W.3d 52, 56-57 (Mo. Ct. App. 2006).

[125] 813 F.3d 891 (9th Cir. 2016).

speech that merits greater protection under the Speech Clause than products and advertising.[126] The film, the court held:

> is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life — including the stories of real individuals, ordinary or extraordinary — and transform them into art, be it articles, books, movies, or plays. If California's right of publicity law applies in this case, it is simply a content-based speech restriction. As such, it is presumptively unconstitutional[.][127]

While the court rejected Sarver's right of publicity claim, its opinion was not a complete victory for producers. The court suggested that Sarver lost in part because he was not a public figure and/or had not commercialized his identity;[128] this suggests that plaintiffs who are already famous or who have sought to monetize their life stories might prevail on a right of publicity claim against a producer that made an unauthorized docudrama about them.[129]

More recently, actress Olivia de Havilland sued FX Studios for its unauthorized portrayal of her in the docudrama *Feud: Bette and Joan*. De Havilland won at the trial court level. The court held that the film was neither transformative nor subject to the First Amendment, as it was nothing more than a straightforward depiction of de Havilland without due compensation.[130] The California Court of Appeal reversed in a strongly worded opinion that invoked free speech principles. "[T]he right of publicity cannot, consistent with the First Amendment, be a right to control a celebrity's image by censoring disagreeable

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[126] *Id.* at 905-06; *see also* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 131 (2020) (discussing case).

[127] *Sarver*, 813 F.3d at 905-06.

[128] *Id.*

[129] *See* Jennifer E. Rothman, *Ninth Circuit Tosses Hurt Locker Case*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Feb. 17, 2016), https://rightofpublicityroadmap.com/news_commentary/ninth-circuit-tosses-hurt-locker-case/ [https://perma.cc/4MAD-ZT3F] (noting this qualification in *Sarver* and discussing its implications).

[130] De Havilland v. FX Networks, LLC, No. BC667011, 2017 WL 4682951, at *8-12 (Cal. Super. Ct. Sept. 29, 2017) (denying defendant's anti-SLAPP motion to strike complaint).

portrayals."[131] Here, too, while the studio prevailed in the end, the message of the litigation was unclear. De Havilland's initial victory both created uncertainty about the application of the First Amendment to docudramas and showed that lawsuits by subjects were plausible enough to be costly for studios.[132]

Further complicating the doctrinal picture is the line of cases holding that athletes depicted in video games can state right of publicity claims against game developers, despite their plausible First Amendment defenses. In a pair of cases, the Ninth Circuit held that the Speech Clause does not insulate video game developers from right of publicity suits brought by athletes depicted in those games.[133] The video game issue is not precisely the same as the one presented by docudramas. Those cases involve athletes' names, likenesses, and statistics; docudramas involve narratives of subjects' lives. The *Sarver* court reasoned that docudramas are more creative and thus more deserving of constitutional protection than video games, but this distinction has been explicitly rejected by the Supreme Court.[134] The video game cases thus provide another data point supporting the possible success of subjects seeking to sue studios for unauthorized docudramas under the right of publicity.

A quick glance at the holdings of the decisions in *Sarver* and *de Havilland* might suggest that free speech interests have clearly been elevated over right of publicity claims brought by subjects of unauthorized docudramas. But as the foregoing discussion illustrates,

[131] De Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d. 625, 647 (Cal. Ct. App. 2018) (citing Comedy III Prods, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 804 (Cal. 2001)).

[132] Similarly, the subject of a docudrama sued its maker, Lifetime Entertainment, under New York's right of publicity statute. An appellate court rejected his claim, holding that the largely fictionalized nature of docudramas protected them from liability. Porco v. Lifetime Ent. Servs., LLC, 147 A.D.3d 1253, 1255-56 (N.Y. App. Div. 2020). But the trial court had initially ruled in favor of the subject, reflecting similar ambivalence about the issue.

[133] Davis v. Elec. Arts Inc., 775 F.3d 1172, 1176 (9th Cir. 2015); Keller v. Elec. Arts Inc., 724 F.3d 1268, 1284 (9th Cir. 2013) ("Under California's transformative use defense, EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment.").

[134] *See* Brown v. Ent. Merch. Ass'n, 564 F.3d 786, 789-90 (2011) ("[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas – and even social messages – through many familiar literary devices.").

the truth is far murkier. Different courts have reached very different holdings in the context of the right of publicity and fictionalized life stories. This divergence grows out of disagreement about how to approach the tension between the plaintiff's interest in their identity and the defendant's Speech Clause concerns. The *Sarver* and appellate *de Havilland* courts situated the plaintiffs' right of publicity claims as content-based speech restrictions, which unsurprisingly led to the defendants prevailing. But the *de Havilland* trial court asked a question less favorable to the studios — was the use of the subject's identity transformative?[135] — which led to a preliminary victory for the plaintiff.[136] And the Missouri Supreme Court in *TCI Cablevision* asked a more plaintiff-friendly question still: whether the use of the defendant's identity was predominately commercial or expressive,[137] eventually resulting in an eight-figure judgment for the plaintiff on remand. The resulting doctrinal picture is fraught with uncertainty about how a court would resolve a lawsuit brought by the subject of an unauthorized docudrama.

C. Private Ordering: The Life Story Deal

Given the risk that the subject of an unauthorized docudrama could state a plausible right of publicity claim against its producer, studios have reacted as one might expect: They often bargain with docudrama subjects prior to starting production to acquire the rights to the subject's life story. This Subpart traces the history of this practice, outlines its contemporary contours, and illustrates its benefits for production companies.

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[135] This is the leading test used in California to mediate between right of publicity and free speech. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.2d 797, 807-11 (Cal. 2001). The appeals court in *de Havilland* held that the test did not apply to docudramas because they were inherently transformative.

[136] The trial court did not rule for de Havilland after a trial on the merits, but rather held that her complaint survived the defendant's motion to strike under the California anti-SLAPP statute.

[137] Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).

1. History of Life Story Deals

The dramatization and embellishment of real-life people and events has, of course, been a staple of creative expression for centuries,[138] and throughout most of history, these stories have been told without significant legal clearance. But with the increased risk of liability during the twentieth century,[139] producers began to seek permission from living individuals whose stories they wished to portray on film, even if images or likenesses of those persons were not displayed.

The first such transaction that we have identified is producer Jesse Lasky's 1919 proposal to acquire the rights to produce a film about the famous World War I hero Sergeant Alvin C. York.[140] Though York first rebuffed Lasky's offer, insisting that "[m]y life is not for sale,"[141] the producer eventually acquired the rights to York's story for $50,000 and released the Oscar-winning film *Sergeant York* in 1941.[142]

Though the expansion of television in the 1950s led to an increasing number of televised docudrama movies and miniseries,[143] it was not until the 1970s and 1980s, a period characterized by the overwhelming popularity of made-for-tv docudramas,[144] that television producers

[138] John Aquino traces the first attempts to "present dramas based on contemporary events" to a Greek play written in 492 BC *See* AQUINO, *supra* note 73, at 11.

[139] *See* Contreras & Fagundes, *supra* note 5, at 177-78.

[140] *See* PAT SILVER-LASKY, HOLLYWOOD ROYALTY: A FAMILY IN FILMS (2017) ("As war heroes went, nobody could top Sergeant York.").

[141] *Id*. *See also* Todd McCarthy, *The Making of Howard Hawks "Sergeant York*," SCRAPS FROM THE LOFT (Jan. 9, 2017) (describing Lasky's acquisition of York's life story), https://scrapsfromtheloft.com/movies/sergeant-york-making-of/ [https://perma.cc/TAR7-PXJF].

[142] *See* Lasky v. Commissioner, 22 T.C. 13, 14 (1954).

[143] *See* EILEEN KARSTEN, FROM REAL LIFE TO REEL LIFE: A FILMOGRAPHY OF BIOGRAPHICAL FILMS vii-viii (1993) ("With the advent of television, biographical films reached a new popularity, and were made not only about major current and historical personalities, but also about minor personalities who briefly made the headlines — films frequently limited to the event that made them famous. With television, too, the lives of major figures now could be made into mini-series lasting four to eight hours, stretching over two or three nights and exploring many aspects of their lives in detail."); Tom W. Hoffer & Richard Alan Nelson, *Docudrama on American Television*, 30 J. U. FILM ASS'N 21, 23-24 (1978).

[144] *See* Renee Wayne Golden, *The Business of Movies for TV: What Practitioners Should Know*, N.Y. L.J., May 29, 1987, at 5 ("The subject of docudramas that do not concern the

began as a matter of course to acquire life story rights from their subjects. With the rise of major streaming networks including Netflix, Amazon Prime, AppleTV and HBO Max in the early 2010s, and their constant need for new programming content, the docudrama genre has again surged in popularity, along with the life story deal.

2. Transactional Elements

Though the details may vary, most life story acquisitions share a set of four common features:[145] (1) the subject grants the right to produce a feature based on the subject's life, which may be fictionalized to some degree; (2) the subject waives any possible causes of action connected with the feature, ranging from copyright infringement to defamation and the right of publicity; (3) the subject agrees to cooperate with the production and, in some cases, to grant access to archival materials, photographs, diaries, and other tangible materials, and (4) the subject agrees to cooperate exclusively with the production and not with any competing production. In exchange, the producer pays the subject an agreed amount.[146]

3. Modularity and Transactional Efficiencies

The amalgamation of these discrete elements under the common label "life story rights" fulfills several functions in the market. First, it facilitates transactions in life stories by creating a convenient transactional *module*.[147] Thus, when negotiating a life story acquisition, the parties can reach a deal with a single price tag, rather than haggle over the price of separate liability releases, access, and exclusivity provisions, making these transactions more efficient. Information costs are reduced because comparisons between prices of comparable life

celebrity will vary. So many have covered quadriplegics, Alzheimer's disease, cancer, blindness, etc. that they have become known as 'disease of the week'. Others depict the heroic exploits of an individual overcoming insuperable odds, e.g., winning a highly contested athletic event or escaping from a prison camp. Some are love stories, some are political, few are comedic.").

[145] *See* Contreras & Fagundes, *supra* note 5, at 187-97(discussing the elements of life story deals).

[146] *Id.* at 194-96 (discussing compensation).

[147] *See id.* at 205-08.

story deals can be made more readily than comparisons of prices for separate deal elements. The establishment of clear contractual rules regarding the use and exploitation of an individual's life story can also eliminate the uncertainty created by variations in state law, and among federal judicial circuits, further enhancing transactional efficiency.[148]

Treating life story rights as transactional modules can also serve a valuable signaling function. [149] The general parameters of these deals are often publicized in the trade press, blogs, and social media, generating positive "buzz" for a project, building public interest and, presumably, greater viewership and stronger reviews. In addition, the acquisition of a life story by a producer signals to other producers that a project is in the works, thereby dissuading others from pursuing a competing project of their own.[150] Finally, a subject's sale of their life story to a producer can signal to the public the value and authenticity of the subject's story, potentially leading to interviews, guest appearances, endorsement deals, book contracts, and other related gains for the subject. As such, life story deals offer benefits both to producers and subjects, further explaining their prevalence in the industry.[151]

4. Modularity as a Gateway to Property

In addition to the transactional efficiencies described in Subsection 3, above, the modularization of life story rights suggests a deeper shift in the perception and legal conceptualization of individual personae. Henry Smith contrasts the conceptualization of property, broadly conceived, as a bundle of *in personam* jural relations (the "bundle of sticks" metaphor frequently used by courts and 1L property law

[148] *Id.* at 207.

[149] *See id.* at 209-10.

[150] This form of signaling can be especially important when multiple sources exist for a particular story. *Id.* at 210 n.252 (discussing competing accounts of Anna Sorokin's story).

[151] It is worth noting, however, that some producers may elect not to seek, or pay for, life story rights when they deem the risk of liability to be acceptable. Examples include the popular film *The Social Network*, in which rights were not obtained from Mark Zuckerberg, the founder of Facebook, or the television series *The Crown*, which did not obtain rights from any members of the British royal family. *See id.* at 183 (discussing uncooperative subjects).

instructors) with the conceptualization of property as a set of rules acting on *in rem*, "things."[152] Smith argues that, rather than a bundle of individual relations among actors, property is better viewed as a set of legal relations that are defined in terms of such things.[153]

The unification of the different strands of life story rights into an *in rem* module would position them as a form of property with all of its accompanying attributes: assignability, hereditability, and the like. Seen through this lens, even though the law does not (yet) recognize a positive property interest in one's life story, its principal elements — authorization, release, access, and exclusivity — aggregated under the construct of life story rights, could be argued to resemble a privately engineered property right.[154] In the next Part, we assess some of the concerns around treating life stories as property.

II. FROM PUBLIC FACTS TO PRIVATE PROPERTY

What, if anything, is wrong with acquiring life story rights? At first glance, the answer appears to be: nothing at all. They are private agreements that deliver compensation to docudrama subjects and create efficiencies for producers. In this Part, we explain why this widespread practice is problematic: it erodes an important aspect of our shared public domain. By creating a social expectation and contractual framework that situate life story rights as things to be possessed and sold, these deals upend law's commitment to preserving facts — including the facts that comprise the narratives of our lives — as a shared public resource. Thus, while life story acquisitions may be

[152] Smith, *supra* note 8, at 1695-1701.

[153] *Id.* at 1701.

[154] The encapsulation of contractual rights as property-like interests is not unique to life story rights and resembles in many ways the evolution of idea submissions in Hollywood. In *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956), the California Supreme Court recognized an implied contract arising from the submission of a screenplay idea to a Hollywood studio, despite the lack of copyright protection in mere ideas. As such, the court opened the door to treating such idea submissions as property interests beyond the traditional scope of copyright. And as a result, as one commentator observes, the court "smoothed the fissures of copyright's idea-expression distinction, offering legal protection for ideas to be commodified and sold in the media marketplace." Eric Hoyt, *Writer in the Hole:* Desny v. Wilder*, Copyright Law, and the Battle over Ideas*, 50 CINEMA J. 21, 22 (2011).

efficient and beneficial to the parties — both producers and subjects — in effecting such transactions and eroding the public domain the parties create a significant negative externality that detriments the public.

In this Part, we elaborate the centrality of the public domain to creativity and free expression; then we show how private agreements can generate norms that effectively erode aspects of the public domain.

A. Free Expression, Facts, and the Public Domain

Property law deploys a variety of strategies to govern both tangible and intangible resources, ranging from private ownership to shared commons to public property.[155] In this Section, we first describe the concept known as the public domain, and then explore its relationship to the Speech Clause of the First Amendment.

1. The Public Domain

The public domain consists of the body of intangibles that are, as Jessica Litman has phrased it, "ineligible for private ownership."[156] The public domain's defining characteristic is that it is not subject to exclusive appropriation by any single interest. Anyone can use content that comprises the public domain without restriction.

The public domain is important because it is the source of much of the raw material that is used in creative production. As James Boyle argues, the public domain is "the basis for our art, our science, and our self-understanding. It is the raw material from which we make new inventions and create new cultural works."[157]

Included within the public domain are otherwise protectable works whose protection has lapsed due to the natural expiration of their

[155] *See* Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131, 131 (2000) ("[P]roperty regimes mix elements of public, common, and private ownership.").

[156] Jessica D. Litman, *The Public Domain*, 39 EMORY L.J. 965, 975 (1990); *see also* BOYLE, *supra* note 32, at 38 ("The public domain is material that is not covered by intellectual property rights."); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1338 (2004) ("[W]e offer the following definition: Public domain: [r]esources for which legal rights to access and use for free (or for nominal sums) are held broadly.").

[157] BOYLE, *supra* note 32, at 39.

term,[158] or their premature invalidation by a court or competent administrative agency.[159] The public domain also includes things that fail to satisfy the minimum criteria for intellectual property protection, such as inventions that are found to be obvious in view of the prior art[160] and works of authorship that fail to meet the minimum threshold for originality.[161] Holders of intellectual property rights such as patents and copyrights can voluntarily abandon or commit their works to the public domain.[162] In addition, there are various categories of work that are, by definition, ineligible for intellectual property protection, such as unpatentable products of nature, abstract ideas and natural laws,[163] and works of authorship created by federal employees.[164] As discussed in the Introduction,[165] facts, no matter how valuable, interesting or complex, also fall into the category of unprotectable content. They are, by their very nature, part of the public domain and thus "free as the air to common use".[166]

[158] The term of a U.S. copyright is the life of the author plus seventy years, or ninety-five years for corporate works. 17 U.S.C. § 302. The term of a U.S. patent is twenty years from the date of filing. 35 U.S.C. § 154(a)(2).

[159] *E.g.*, copyrights that lapsed due to a failure to renew or register under prior statutory regimes, or patents that have been invalidated for causes including inequitable conduct.

[160] *See* 35 U.S.C. § 103 ("A patent for a claimed invention may not be obtained . . . if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious . . . to a person having ordinary skill in the art to which the claimed invention pertains.").

[161] *See* 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship.").

[162] *See* Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487 (2020).

[163] *See, e.g.*, Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576 (2013) (products of nature do not constitute patent eligible subject matter); Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc., 566 U.S. 66 (2012) (mental processes and laws of nature do not constitute patent eligible subject matter); Bilski v. Kappos, 561 U.S. 593 (2010) (abstract ideas do not constitute patent eligible subject matter).

[164] 17 U.S.C. § 105 (works created by employees of the Federal Government are not subject to copyright).

[165] *See supra* notes 3–4 and accompanying text.

[166] Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting); *see also* Corbello v. Valli, 974 F.3d 965, 975-76 (9th Cir. 2020); Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1368-69 (5th Cir. 1981) (noting that facts, in

This division between private and public intangibles is not a mere formality; rather, it is an essential premise of our systems of free expression and creative production that some information is reserved for the use of all without payment or the need to obtain permission. In fact, the usage of private assets often depends on the availability of some shared resources. In the physical world, these include roads, watercourses, and shared spaces that facilitate trade and sociality. With respect to intangibles, public discourse and creative expression require that certain information, such as ideas, scientific principles, and facts, be free for all to use. As Litman observes, "[t]he public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."[167]

But the public domain necessarily depends on law to define its contours and the boundary between privately owned resources and shared ones. The status of facts as critical parts of the public domain is protected predominately by two sources of law: the Speech Clause of the First Amendment and federal copyright law.

2. The Speech Clause and the Public Domain

Consider the Speech Clause. Courts have held that certain facts are essential to facilitate a robust, independent press and, thereby, an informed public. Court records illustrate this point. Even where information contained in legal filings is highly sensitive and its disclosure could harm its subjects, courts have still hewed to the principle that facts disclosed in public proceedings[168] are part of the public domain and that their public disclosure is constitutionally

contrast to the expression used to recount them, are not original and therefore may not be copyrighted).

[167] Litman, *supra* note 156, at 968; *see also* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, O'Scannlain and Kleinfeld, JJ., dissenting from denial of en banc rehearing) ("Creativity is impossible without a rich public domain . . . . Overprotection stifles the very creative forces it's supposed to nurture.").

[168] Private facts are a different matter. Where information has not been placed before the public, courts are willing to sanction those who publicize it, such as by imposing tort liability for the public disclosure of private facts. *See supra* note 100.

protected.[169] Mindful of the nontrivial downsides of disseminating embarrassing information, the Supreme Court ruled that such costs are justified to preserve "the overarching public interest, secured by the Constitution, in the dissemination of truth."[170]

The Speech Clause has also been used to overcome tort claims for the intentional infliction of emotional distress. For example, in *Snyder v. Phelps*,[171] members of Westboro Baptist Church lawfully picketed the funeral of a soldier killed in Iraq to communicate their belief that God hates the United States for its tolerance of homosexuality, particularly in the military. The soldier's family sued the picketers for intentional infliction of emotional distress. The Supreme Court held that the Speech Clause prohibits the imposition of tort liability for speech concerning a matter of public importance simply because it is offensive.[172] Likewise, the Court has held that local property-based regulations cannot restrict speech, including the posting of expressive yard signs.[173]

Facts have value to the public even when they serve to further entertainment and hobbies. The Supreme Court first extended First Amendment protection to films in 1952.[174] Then, in *C.B.C. Distribution &*

[169] *See* Fla. Star v. B.J.F., 491 U.S. 524, 529-32 (1989) (invalidating civil damages awarded for publishing name of rape victim obtained from erroneous government disclosure); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) (invalidating civil damages award for broadcasting name of rape victim obtained from public court records). Of course, many facts involved in public proceedings remain under seal. These facts have not been put into the public record, and hence are not part of the public domain.

[170] *Fla. Star*, 491 U.S. at 533 (citations and internal quotation marks omitted).

[171] 562 U.S. 443 (2011).

[172] *Id.* at 458 ("Such speech cannot be restricted simply because it is upsetting or arouses contempt. 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[173] City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[174] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (striking down a New York censorship law on the basis that motion pictures constitute a significant medium for the communication of ideas protected by the First Amendment, thus overruling *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), which held that motion pictures are not protected expression, but merely theatrical business products).

Marketing, Inc. v. Major League Baseball Advanced Media, L.P., the Eighth Circuit held that the Speech Clause permits free use of baseball players' names and statistics.[175] While the court was aware that unauthorized use of player information could trigger liability under state publicity laws, it nevertheless held that because such facts are "readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone."[176] The First Amendment was also the theory that courts invoked to reject right of publicity claims brought by the subjects of unauthorized docudramas in *de Havilland* and *Sarver*, stressing that life story facts are constitutionally protected for free use by all.[177]

Of course, the Speech Clause does not authorize every form of speech in all circumstances, and there are numerous limitations on the extent of its reach even as to the dissemination of facts. Thus, in a recent case, the Ninth Circuit held that the Speech Clause did not authorize a company to use individuals' names and personal information in a commercial business directory.[178] Yet unlike a business directory, the content of docudrama productions is undeniably expressive, giving it much greater protection under the First Amendment.

3. Copyright Law and the Public Domain

Copyright furnishes another salient example of the coexistence of property and the public domain because its public-oriented aspiration is enshrined in the Constitution. The so-called Progress Clause authorizes

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[175] C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007).

[176] *Id.* at 823.

[177] *See* Sarver v. Chartier, 813 F.3d 891, 905-06 (9th Cir. 2016) ("*The Hurt Locker* is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life — including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays."); De Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d 625, 630 (Cal. Ct. App. 2018) ("[A] person portrayed in one of these expressive works . . . does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto [a] creator's portrayal of actual people."). *But see* Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003) (concluding that plaintiff's right of publicity interest prevailed over the public's Speech Clause concerns).

[178] Martinez v. ZoomInfo Techs. Inc., No. 22-35305 (9th Cir. Nov. 29, 2022).

Congress to enact copyright laws not primarily to secure a return on investment for authors, but rather as a method of ensuring "the progress of science and useful arts."[179] As the Supreme Court has elaborated, "[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[180] An essential way that copyright seeks to achieve these public goals is by preserving a body of content that is free for everyone to use: the public domain.[181]

Access to the public domain is particularly critical to the cultural ecosystem because all authorship builds on and borrows from extant material. Contrary to the myth of the romantic author who generates brilliant art out of thin air, the reality of creation involves addition to and borrowing from preexisting works.[182] As Jessica Litman has cautioned, "in the absence of [the] public domain, much of [authorship] would be illegal."[183]

In this Subsection, we have shown that the public domain consists of a constellation of content that lies beyond the reach of private control. Facts are a core part of the public domain, secured there by a pair of sources of law for related but different rationales. In terms of the Speech Clause, facts must be available for all to use to promote free flowing

[179] U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power to . . . promote the progress of science . . . by securing for limited times to authors . . . the exclusive right to their respective writings . . . .").

[180] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); *see also* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.").

[181] *See* Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 975 (4th Cir. 1990) ("The philosophy behind copyright . . . is that the public benefits from the efforts of authors to introduce new ideas and knowledge into the public domain.")

[182] Litman, *supra* note 156, at 966 ("The process of authorship . . . is more equivocal than that romantic model admits. To say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliche, invoked but not examined."); *see also* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 459 (1991) (critiquing "the Wordsworthian vision of the 'author-genius' with privileged access to the numinous"); David Lange, *Recognizing the Public Domain*, 44 L. & CONTEMP. PROBS. 147, 171-73 (1981).

[183] Litman, *supra* note 156, at 967.

dialogue about matters of public import. And in terms of copyright, shared factual content is one of the central building blocks on which creative expression depends. In the ensuing Section, we illustrate how life story acquisitions have converted part of the public domain — life stories — from public to private property.

B. How Life Story Deals Turn Public Facts into Private Property

The public domain, like the physical environment, is under constant threat of erosion. As intangible property becomes increasingly valuable, companies and individuals have strong economic incentives to convert content in the public domain into private property that they can exploit and monetize. In this Section, we argue that the Hollywood practice of acquiring life story rights exemplifies this trend. We first illustrate the essential tension between the expanding, property-like right of publicity and content that is reserved to the public. We then show how life story deals leverage this conflict and effectively turn life stories into private property that producers must seek permission to use, rather than content that is free for anyone to access without permission.

1. Rights of Publicity Encroach on the Public Domain

We are not the first to observe that the ever-expanding right of publicity conflicts with adjacent areas of law.[184] One site of conflict pits the right of publicity against the exclusive rights of copyright owners. Take, for example, a photograph that depicts a famous individual but whose copyright is owned by someone else. Can the famous subject assert a right of publicity against the copyright owner for selling copies of the work? Most courts have answered this question in the negative, concluding that the copyright owner's federal right trumps the subject's state-law right of publicity claim.[185] A harder question arises, though, when the right of publicity conflicts with the public domain.

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[184] *See* ROTHMAN, *supra* note 85, at 138 ("[R]ight of publicity's . . . interference with free speech has been front and center in recent years."); *id.* at 160 ("[F]rom the beginning, right of publicity laws . . . have clashed with copyright law.").

[185] *See In re* Jackson, 972 F.3d 25, 35 (2d Cir. 2020); Maloney v. T3 Media, Inc., 853 F.3d 1004, 1007 (9th Cir. 2017). *But see* Brown v. Ames, 201 F.3d 654, 656 (5th Cir. 2000).

As the foregoing Section details, the law seeks to preserve certain content for public use. But the right of publicity confers a property-like interest in certain content associated with our identities: names, likenesses, and, in some instances, the events that have occurred in our lives. Here, the conflict lies not between two affirmative rights, as in the case of the copyright owner and subject of the same photograph. Rather, it arises from a party claiming a right of publicity interest in content (facts) that the law seeks to secure to the public domain. The conflict is not between two private rights holders, but between a private right holder and the public. Hence, as Rothman observes, the expanding right of publicity steadily encroaches on the "negative spaces" that are critical to unfettered communication and creative expression.[186]

2. How Life Story Deals Erode the Public Domain

Life story deals give rise to another site of conflict between the right of publicity and the public domain. The very idea of life story "rights" is incongruous — there is no "right" with which to transact. And while producers do not negotiate life story deals with all subjects, many — and by some accounts, most — docudramas start production only after the acquisition of life story rights.[187]

a. Expanding Rights Through Private Ordering

The typical way that the public domain is eroded is through direct legal expansion of the boundaries of property rights. For example, content that was formerly free for all to use can be converted to private property by a statutory or judicial expansion of the scope or duration of copyright.[188] However, the transactional practices of parties can also

[186] ROTHMAN, *supra* note 85, at 177-79 (discussing encroachment of right of publicity on copyright's negative spaces).

[187] *See* Contreras & Fagundes, *supra* note 5, at 159. There are, of course, notable exceptions, in which producers knowingly take the risk of producing such a feature without the consent of the primary subjects. *See id.* at 208-09 (discussing features such as *The Social Network* and *The Crown*, in which the producers knowingly proceeded without acquiring rights from, respectively, Facebook founder Mark Zuckerberg and the British royal family).

[188] *E.g.*, Golan v. Holder, 565 U.S. 302 (2012) (upholding Section 514 of the Uruguay Round Agreements Act of 1994, which granted copyright status to foreign works

reduce the public domain. For example, in licensing transactions copyright owners may purport to license rights that are broader than those that are statutorily authorized, thereby limiting licensees' freedom to exploit those rights (either by requiring payment or imposing limitations on action).[189] This type of mutual over-claiming, if it becomes a routine practice, can serve to expand the boundaries of legal rights at the expense of the public domain. As observed by James Gibson,

> If a rights-holder can show that it routinely issues licenses for a given use, then copyright law views that use as properly falling within the rights-holder's control. Thus, the practice of licensing within gray areas eventually makes those areas less gray, as the licensing itself becomes the proof that the entitlement covers the use. Over time, public privilege recedes, and the reach of copyright expands; this moves the ubiquitous gray areas farther into what used to be virgin territory, which in turn creates more licensing markets, which in turn pushes the gray areas even farther afield, and so on. Lather, rinse, repeat.[190]

This kind of overreaching licensing is particularly prevalent in click-through software licenses. These agreements often require users to refrain from behavior that would otherwise be permitted by copyright law. For example, click-through agreements may prohibit users from reselling a purchased copy of the work (otherwise permitted under the first sale doctrine) or reverse engineering the work for purposes of ensuring compatibility with other products (otherwise permitted as a fair use).[191] Several courts have approved these contractual restrictions

previously in the public domain); Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding Copyright Term Extension Act, which granted all copyright owners 20 additional years of protection, shifting those two decades from public to private ownership).

[189] See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007).

[190] *Id*.

[191] *See id.* at 890-91. Numerous courts during the 1980s and 1990s held that the reverse engineering of computer software and video game cartridges constituted fair use under the Copyright Act. *See* Sega Enters., Ltd. v. Accolade, Inc., 977 F.2d 1510, 1518 (9th Cir. 1992); Atari Games Corp. v. Nintendo, Inc., 975 F.2d 832, 843 (Fed. Cir. 1992); NEC Corp. v. Intel Corp., No. C-84-20799, 1989 U.S. Dist. LEXIS 1409, at *34-42 (N.D. Cal.

on the theory that, while the law provides baseline entitlements and rights, parties remain free to reorder them using private agreements.[192] As a result, first sale and fair use prerogatives have been significantly curtailed for users of software, redrawing the boundaries of the public domain through the use of private agreements. As observed by Jennifer Rothman, "[l]eft unchecked, customary practices threaten to swallow up IP law and replace it with industry-led IP regimes that give the public and other creators more limited rights to access and use intellectual property."[193]

b. Private Rationales for Life Story Deals

Why do studios take the sometimes-costly step of acquiring life story rights when the facts of individual life stories are part of the public domain? The reasons are several, but a major one is the desire to avoid the risks of litigation and liability, particularly under the right of publicity.[194] While most courts have recognized that free speech concerns trump right of publicity claims in the docudrama context, there is enough ambivalence in the case law that many studios, acting out of reasonable risk aversion and a desire to avoid bad publicity, prefer to pay subjects a modest amount for the right to use their life stories.[195]

Moreover, the risk of litigation in this area may be higher with respect to life story rights than other aspects of feature production. Where IP is

1989). As a result, software and game vendors began to include contractual prohibitions on reverse engineering in their licensing agreements. These restrictions were challenged as seeking to preempt copyright law, but those challenges have largely been unsuccessful. *See* Bowers v. Baystate Techs. Inc., 320 F.3d 1317, 1323 (Fed. Cir. 2003). For a discussion of reverse engineering prohibitions, see JORGE L. CONTRERAS, INTELLECTUAL PROPERTY LICENSING AND TRANSACTIONS: THEORY AND PRACTICE 585 (2022).

[192] *See* Gibson, *supra* note 189, at 890. *But see* ML Genius Holdings LLC v. Google LLC, No. 20-3113, 2022 WL 710744, at *4 (2d Cir. 2022) (rejecting state-law unfair competition claims by music lyrics website against entity that copied content from its website because plaintiff did not own the copyright in the copied lyrics).

[193] Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1908 (2007).

[194] *See* Contreras & Fagundes, *supra* note 5, at 208-09.

[195] In other work, we interviewed numerous Hollywood insiders who reported that while they were aware that life stories need not be acquired before making docudramas, they often paid subjects for life story rights to avoid the kind of bad optics that Hulu suffered in the "Mike" controversy.

particularly tied to identity, unauthorized use tends to trigger deeply held moral intuitions, leading subjects to feel violated or treated unjustly.[196] In such situations, an individual is likely to sue or create public controversy to ventilate their sense of moral outrage, even if they stand to gain little economically from the dispute.[197] This moral-psychological account likely explains much of the dynamic surrounding life story deals. It is hard to imagine a kind of information more closely connected to one's identity than their life story, hence the likelihood that aggrieved individuals will seek legal recourse, no matter their chances of success.[198] This heightened risk of litigation may also motivate producers to acquire life story rights from the subjects of docudramas, even though doing so is not technically necessary. But, as Gibson has shown, this dance between self-interest and risk aversion inexorably leads to the expansion of owners' rights at the expense of public information.[199]

c. Reinforcing Lay Intuitions About Ownership of Life Stories

The common practice of acquiring life story rights, coupled with regular media coverage of these deals, reinforces in the lay public the idea that the acquisition of life story rights is actually necessary to produce a docudrama. Whatever the law may say about the contours of the public domain, laypeople start with a strong intuition that they have a property-like interest in their life stories.

The conflict between Hulu and Mike Tyson over the unauthorized "Mike" docudrama illustrates how life story deals have infiltrated the

[196] *See, e.g.*, *supra* note 1 and accompanying text; *supra* notes 80 & 83 (Tyson).

[197] *See* Christopher Buccafusco & Dave Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2466-69 (2016) (cataloguing a variety of non-economic motivations that motivate copyright plaintiffs including a sense that an infringer has "stolen" something of value from the creator).

[198] *See supra* notes 80–83 and accompanying text (discussing Tyson example); *see also* Alyssa Miller, *This Is Why Pamela Anderson Refuses to Watch Hulu's 'Pam & Tommy'*, NO FILM SCH. (Feb. 15, 2022), https://nofilmschool.com/pamela-anderson-and-hulus-pam-and-tommy#:~:text=Unfortunately%2C%20that%20is%20not%20the,2004%2C%20disregarding%20Anderson%27s%20life%20rights [https://perma.cc/F8M5-VCDE] (noting that Pam Anderson and Aldo Gucci were offended by unauthorized docudrama depictions).

[199] Gibson, *supra* note 189.

popular consciousness.[200] Tyson's strenuous objection to Hulu's failure to secure his permission before making "Mike" (a sentiment that many members of the public shared) was framed not simply as offensive, but as an unlawful appropriation of his "life story."

Studios participate in this feedback loop by acquiescing to the increasing pressure to procure life story rights from subjects rather than relying on their right to produce docudramas without them.[201] What's more, attorneys drafting life story agreements exacerbate this incorrect understanding by routinely including "grant" provisions in them. That is, using language comparable to that seen in assignments and licenses of the copyright in books, scripts, and musical compositions, the life story subject formally grants the acquiring producer a license to use and adapt the life story for specified media and formats (e.g., film, television, etc.).[202] This unnecessary contractual verbiage effectively converts a right that the producer already had to one that it has contractually acquired from the subject. As a result, the practice of executing life story agreements prior to producing docudramas treats content that is rightly part of the public domain — life stories — as the private property of the individuals who lived those lives.

d. The Problem with Propertized Life Stories

While life story transactions may appear to represent a rational allocation of risk between parties, they also exact a social cost on the public by removing life stories from the public store of knowledge — not only in individual cases, but across the board. When customary practices such as this operate at cross purposes with the public domain, they configure public/private ownership of information without including a key stakeholder — the public — in the decisional process. The absence of this voice from private negotiations means that the negative externalities caused by these agreements will not be reflected in these deals, invariably derogating from our systems of free expression and creative production.[203]

[200] *See supra* notes 80–83 and accompanying text.

[201] *See* Contreras & Fagundes, *supra* note 5, at 200-04.

[202] *See id.* at 187-89.

[203] *See* Rothman, *supra* note 193, at 1908.

This trend is problematic at several levels. In addition to emboldening subjects to seek payment for their life stories, lay expectations concerning life story rights threaten to deter creative production. Would-be creators may decline to embark on new creative projects about real life subjects, thinking that they cannot do so without acquiring and paying for life story rights first. And even creators who correctly understand that the law does not vest life story rights in individuals may decline to pursue projects if they conclude that the rights are too costly to secure. The net effect of these dynamics is that life stories are being converted from public to private property because the principal actors treat them as such.

Even worse, as Gibson suggests,[204] the accumulation of lay intuitions and industry practice can result in actual changes to the law. In the case of life story rights, courts, persuaded by the lay intuitions described above, could start to recognize a property interest in the events comprising one's life story, and a formal property right would be born. Such a generally applicable property regime applied to life stories would then entitle everyone, not only key figures whose cooperation and exclusivity producers wish to secure, to claim compensation for the recounting of their stories. This situation would upend current industry practice in which life story subjects are typically paid only if they can bring value to the production beyond the bare facts of their lives. Adding an acquisition requirement to the narrative of every individual appearing in a production would substantially increase the cost of productions based on real life events — an increase that would likely decrease the number of such productions made, thereby depriving the public of content having potential social interest and informational value.

Conversely, to the extent that rights are not secured from every individual depicted in a production, more individuals would be able to bring legal claims against productions for compensation. The resulting litigation costs would, again, increase the cost of production and make docudramas inherently more costly than comparable stories of a fictional nature. Likewise, producers that acquired life story rights from individuals would hold property rights enforceable against competing

[204] *See supra* notes 189–192 and accompanying text.

producers. Thus, if one studio purchased life story rights from an individual, the studio could theoretically bring a claim against a competing production for no other reason than the competitor was telling the same story. Such claims, which are otherwise impossible to bring (successfully) with respect to stories about factual events such as wars, droughts, sporting events, and presidential campaigns, would now exist to prevent the release of productions based on events that happened to real people.

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The life story deal is a staple of entertainment industry practice, securing compensation to the subjects of docudramas while creating efficiencies and lowering risk for studios. Until now, this practice has gone unremarked from a normative perspective, generally regarded as an inoffensive vehicle of private ordering. However, in this Part we expose a heretofore unappreciated downside of the life story deal. By creating an industry norm that subjects are entitled to compensation for content that the law otherwise makes available for free, these agreements create both a legal framework and a social expectation that converts facts from public to private property. As a result, they erode an important part of our shared public domain. In the next Part, we explore strategies for ameliorating this harm while maintaining the legitimate benefits that life story deals create for the parties.

III. RESTORING LIFE STORIES TO THE PUBLIC DOMAIN

The foregoing Parts show that the life story acquisition, a typical precursor to the production of a docudrama feature, has the unappreciated effect of converting life stories into a form of private property, thereby removing them from the public domain. In this Part, we explore different approaches to return life stories to the public domain and propose a new federal statute that would prevent states from applying their right of publicity statutes to expressive uses of life story facts.

A. Statutory Limitations on the Right of Publicity

As noted in Part I.B.1, above, twenty-four states have enacted statutes recognizing the right of publicity, while others have recognized it in case

law under general tort and privacy theories. In this Section, we discuss existing state statutory limitations on the reach of the right of publicity, as well as our proposal for a new federal limitation on state right of publicity legislation.

1. State Law Limitations

As discussed in Part I.B.2.a, since *Binns v. Vitagraph* in 1913, individuals have brought claims against docudrama productions under state right of publicity statutes. Beginning with the 1903 New York statute, these legislative enactments have provided a basis for individuals to challenge otherwise protected First Amendment speech in books, films, and television productions. The New York statute, for example, prohibits any use of an individual's "name, portrait or picture" in trade without that person's prior written consent.[205]

Yet not all states have statutory provisions as broad as those of New York, and a number of states exclude from the scope of publicity claims a range of protected content including political messages,[206] news broadcasts,[207] works of fine art,[208] parody or satire,[209] live impersonations,[210] sports broadcasts[211] and, uses that would qualify as fair use under the Copyright Act.[212] In addition to these, statutes in thirteen states expressly prohibit right of publicity claims against expressive works such as books, magazine articles, radio programs, films, and television programs.[213] The Louisiana statute, in fact, specifically identifies "docudramas" as an example of this type of

[205] N.Y. Civ. Rights Law § 50 (2019).

[206] Alabama, Arkansas, California, Hawaii, Illinois, Indiana, Louisiana, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, and Washington.

[207] Alabama, Arkansas, California, Florida, Hawaii, Illinois, Indiana, Louisiana, Nebraska, Nevada, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Washington.

[208] Hawaii, Illinois, Indiana, Ohio, South Dakota, Texas, and Washington.

[209] Arkansas, Hawaii, Louisiana, and Washington.

[210] Illinois and Nevada.

[211] Alabama, Arkansas, California, Hawaii, Illinois, Louisiana, Nevada, Oklahoma, Tennessee, and Washington.

[212] Alabama, Louisiana, and Tennessee.

[213] Alabama, Arkansas, California, Florida, Hawaii, Illinois, Indiana, Louisiana, Nevada, Ohio, South Dakota, Texas, and Washington.

protected content.[214] These states have correctly recognized that the First Amendment overrides state law commercial rights and legislated accordingly. The Restatement is in accord, stating that a "use in trade" covered by the right of publicity "does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses."[215]

Yet the wide variation in state publicity statutes — with states like New York expressly permitting claims against films, others expressly prohibiting them, and a large number in the middle whose laws are unclear — creates confusion and misapprehension in the market. What's more, this variation may pressure parties to adhere to the strictest state regime in an overabundance of caution — the so-called "California Effect" that has been observed in numerous areas of law.[216] Thus, even though a number of states have enacted legislation seeking to prevent the private control of life stories through the right of publicity, the situation remains suboptimal.

While the tension between the right of publicity and the reservation of factual life stories to the public domain, in theory, could be resolved through the uniform adoption of state legislation prohibiting right of publicity claims against expressive content, we believe that this outcome is unlikely for several reasons. First, twenty-six states have never found it necessary to enact legislation relating to the right of publicity at all and instead address issues that arise under privacy, defamation, and other tort theories.[217] For these states, the right of publicity does not appear to be a priority, and legislation limiting this right could likewise lack support within the state legislature. Second, states like New York have retained their broad statutory rights of

[214] LA. STAT. ANN. § 51:470.5(B)(2) (2022).

[215] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (AM. L. INST. 1977); *see also id.* § 47 cmt. c (noting that use of an individual's identity in a film should not be prohibited under the right of publicity).

[216] *See* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 5-8 (1997) (coining term to refer to firms' national compliance with strict environmental and other regulations adopted by California, the largest state). *See generally* Jens Frankenreiter, *Cost-Based California Effects*, 39 YALE J. ON REG. 1155 (2022) (discussing California effect in the area of privacy law).

[217] *See* Rothman, *Roadmap*, *supra* note 86.

publicity even in the face of contravening First Amendment law, and do not seem inclined to limit their existing statutory schemes. Finally, coordinating any kind of state law reform is a major undertaking, and without the intervention of a powerful interest group, it is unlikely that many states would independently adopt such legislation.[218]

2. A Proposed Federal Limitation on the Right of Publicity

Given the low probability that uniform state legislation will be adopted to preserve life stories for the public domain, we propose the enactment of a new federal statute that expressly prohibits states from extending their rights of publicity to cover expressive content such as films and television docudramas. A single federal statute of this nature would be preferable to state-by-state legislation in that it would counteract the fragmented nature of right of publicity law and its exceptions that currently exists across the country.[219] It would also send a strong signal to markets and communities that the federal government strongly supports the public domain and wishes to stem its erosion. A more detailed description of this proposal is set forth below.

a. Scope of the Proposed Limitation

Our proposed federal statute would prohibit states from extending their right of publicity laws to cover expressive content such as books, magazine articles, radio programs, films, and television docudramas, and from enforcing publicity claims against these forms of expressive content. In this regard, our proposal follows the thirteen state publicity statutes that already prohibit claims against such expressive works.[220] For the sake of clarity, we would also include advertising and publicity materials for protected expressive works (e.g., movie posters, trailers, ads, etc.) within the scope of protection.

We limit our proposal to expressive works, as this is where we see the largest contradiction between the right of publicity and the public

[218] *See* Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. CORP. L. 327, 327-28 (2009); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PENN. L. REV. 595, 596 (1995).

[219] *See supra* Part III.B.1; *see also* ROTHMAN, *supra* note 85, at 96-98.

[220] *See supra* note 213.

domain.[221] Our proposal does not seek to eliminate state publicity claims against uses of individual stories or personae on or as part of product packaging, t-shirts, action figures, or other commercial, nonexpressive items.[222] Thus, despite our ambivalence over decisions such as *Carson*[223] (Here's Johnny Portable Toilets), *Midler*[224] (Ford ad using a voice double to impersonate a famous singer), and *White*[225] (robot evoking game show hostess in a Samsung ad), the scope of the current proposal does not reach these admittedly far-reaching (and, in our view, far-fetched) expansions of the right of publicity.

Our proposed statutory restriction would, in effect, be a federal right of publicity safe harbor for certain forms of expressive content. The fact that other types of works are not within the scope of the safe harbor would not prevent their creators from raising First Amendment or other objections to publicity claims brought against them. For example, the makers of an action figure depicting a well-known politician could plausibly rely on the First Amendment when defending against a publicity claim by the politician. Nevertheless, given the broad range of facts surrounding such product categories, we limit the express scope of our proposal to the types of expressive works noted above.

We do not extend our proposal to video games. As noted above, courts disagree over the expressive character of video games, particularly in the context of the right of publicity. [226] We do not believe that video games, which lack a true narrative function, can tell a story in the same way, or as effectively, as a book, film, or television show that proceeds in a (usually) linear manner. In most video games of which we are aware, narrative story elements are mere accessories to the action-based play

[221] *See* Post & Rothman, *supra* note 126, at 136 (proposing highest level of constitutional First Amendment scrutiny of rights of publicity that impact "public discourse").

[222] *See id.* at 138-46 (noting lower standard of constitutional protection for commercial speech and commodities).

[223] Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831 (6th Cir. 1983).

[224] Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

[225] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512 (9th Cir. 1993).

[226] *See supra* notes 133–134 and accompanying text (discussing video games in context of First Amendment and right of publicity).

that defines the primary attraction of the game.[227] As such, we would not expressly include video games within the scope of the federal statute that we have proposed, though, as suggested above, a video game manufacturer would be entitled to raise First Amendment defenses against publicity claims brought against it.

b. Special Consideration for Private Individuals

We are aware of the potential for individual embarrassment, shunning, and other harm that could result from the unrestricted use, disclosure, and dissemination of personal stories in creative media.[228] While we highly value the public domain, we do not value it above all else. As Chander and Sunder famously observed twenty years ago, "for centuries the public domain has been a source for exploiting the labor and bodies of the disempowered — namely, people of color, the poor, women, and people from the global South."[229]

As a result, for individuals who have not placed themselves in the public eye (what we term "private individuals"), we would further limit our proposal to cover only the facts and events of such an individual's life, but not that individual's name, image, or likeness ("NIL"). That is, a producer could rely on the safe harbor afforded by our proposed statute in making a docudrama about a private individual only if it changed the name and physical features of the person depicted. For individuals other than private individuals (e.g., politicians, celebrities,

[227] *See* Jan-Noël Thon, *Narrative Comprehension and Video Game Storyworlds*, *in* VIDEO GAMES AND THE MIND: ESSAYS ON COGNITION, AFFECT AND EMOTION 15, 15 (Bernard Perron & Felix Schröter eds., 2016) ("At least some contemporary video games fulfill the basic conditions of narrativity in that they represent worlds located in space and time as well as populated by characters, what could be roughly described as the (necessary) *interactivity* and (optional) *nonlinearity* of these games results in a number of specific challenges when it comes to narrative comprehension and the inter-subjective construction of video game storyworlds.")

[228] The extremes to which such effects could go are illustrated in the recent *Black Mirror* episode "Joan is Awful", in which "[a]n average woman is stunned to discover a global streaming platform has launched a prestige TV drama adaptation of her life — in which she is portrayed by Hollywood A-lister Salma Hayek." *Black Mirror: Joan is Awful*, IMDB (June 15, 2023), https://www.imdb.com/title/tt20247352/ [https://perma.cc/6P9X-ZHF6].

[229] Chander & Sunder, *supra* note 156, at 1335.

and other public figures), the use of NIL would continue to be protected under the statute.

There are several reasons for drawing this distinction. First, the law of defamation, which is also relevant in life story transactions and also bounded by the First Amendment, makes a similar distinction between private and public figures. In order to state a claim for defamation, a plaintiff must show that the defendant made a false statement about the plaintiff to some third party or the public and that the statement caused the plaintiff measurable harm. If the plaintiff is not a public figure, they need only show that the defendant made the false statement negligently. If they are a public figure, they must show that the defendant made the statement knowing of, or with reckless disregard for, its falsehood.[230] Relatedly, California's Anti–Strategic Lawsuit Against Public Participation ("anti-SLAPP") statute,[231] which has been invoked in several cases to defeat publicity-based claims against docudrama productions,[232] also recognizes a distinction between public and private individuals.[233]

Second, even if facts about a private individual's life can be gleaned without a violation of the individual's privacy (e.g., by consulting court records, observing the individual's activity in public places, interviewing family members, and the like), the widespread dissemination of such information could cause them significant embarrassment, subject them to negative social consequences, or even attract the attention of law

[230] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 281-82 (1964); RESTATEMENT (SECOND) OF TORTS §§ 558, 580A, 580B (AM. L. INST. 1977).

[231] CAL. CIV. PROC. CODE § 425.16 (2023). The statute was "enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation." Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001).

[232] *E.g.*, Sarver v. Chartier, 813 F.3d 891, 902 (9th Cir. 2016).

[233] *See id.* at 901 (explaining that matters of public issue or public concern subject to anti-SLAPP statute include statements "concern[ing] a person or entity in the public eye" (quoting Hilton v. Hallmark Cards, 599 F.3d 894, 906 (9th Cir. 2010))); Kieu Hoang v. Phong Minh Tran, 74 Cal. Rptr. 3d 567, 588 (Cal. Ct. App. 2021) (discussing a public figure opposing an anti-SLAPP motion who failed to carry his burden of establishing a probability that he could show by clear and convincing evidence that the publisher of allegedly defamatory statements acted with actual malice).

enforcement agencies that otherwise would not have been aware of the individual (e.g., a woman obtaining an abortion across state lines).

As we note in Part I.A.4 above, docudrama content is socially valuable because it is true, or at least based on true facts. Yet the nature of the value of those facts to viewers is worth interrogating in greater detail. Fact-based accounts, such as dramatizations of political events, sports milestones, and even high-profile crimes, serve an educational and awareness-raising function: by learning about current events and issues, viewers become more informed citizens and social actors, thereby enhancing democratic processes and institutions. The politicians, sports stars, and criminals who played leading roles in these events placed themselves in the public spotlight and are likely to be associated with those events in the public eye, notwithstanding their further depiction in a docudrama.

The same is not necessarily true with respect to events in the lives of private individuals, even when those events have themselves become newsworthy. In these cases, there may be significant public value in depicting these events, whether that value is principally educational, inspirational, or cautionary. Yet the names and details of the private individuals involved add little to the story and can easily be replaced with fictitious names and other details without detracting from the narrative. For example, the award-winning film, *The Hurt Locker*, depicted the experiences of an American bomb-defusing squad in Iraq.[234] As recognized by the Ninth Circuit, "the Iraq War was a matter of significant and sustained public attention, as was the use of improvised explosive devices ("IEDs") by insurgents during the war."[235] The film's principal character, Will James, was based on the real-life Sergeant Jeffrey Sarver and shared elements of Sarver's appearance, temperament, and biography.[236] The similarities were clearly not coincidental, as the script was written by Mark Boal, a journalist who had been attached to Sarver's squad in Iraq and who both interviewed and photographed Sarver.[237] As discussed in Part I.B.2.b above, Sarver's

[234] THE HURT LOCKER (Voltage Pictures, Grosvenor Park Media, Film Cap. Eur. Funds, First Light Prods. & Kingsgate Films, 2008).

[235] *Sarver*, 813 F.3d at 902.

[236] *Id.*

[237] *Id.* at 896.

right of publicity claim failed under California's anti-SLAPP statute, given the important public interest in the Iraq War.[238]

As an individual, however, Sarver did not necessarily seek the public spotlight. In fact, he "expressly disavowed the notion that he sought to attract public attention to himself."[239] Accordingly, though Sarver's story, and that of his squad and the overall conflict in Iraq, have significant public value, his individual name and likeness, which were largely unknown to the general public, do not.

Perhaps recognizing this, the producers of *The Hurt Locker* changed Sarver's name and personal details when creating the character of Will James[240] and included a disclaimer at the beginning of the film stating that it was a work of fiction.[241] *The Hurt Locker* is not alone in masking the private identities of their subjects, either out of fear of litigation or respect for individual privacy concerns. For example, the 2022 Netflix docudrama "The Stranger"[242] was based on a real-life manhunt for the murderer of a thirteen-year-old Australian boy. [243] The producers invented several scenes and changed the names of the principal characters, including the lead detective on the case, who descended deep into a dark world of crime, sex, and drugs in order to identify and trap the killer. According to one news report, the actor who played the

[238] *Id.* ("[The Iraq] war, its dangers, and soldiers' experiences were subjects of longstanding public attention.").

[239] *Id.* at 905.

[240] *See* Sarver v. Hurt Locker LLC, No. 2:10-cv-09034, 2011 U.S. Dist. LEXIS 157503, at *21 (C.D. Cal. Oct. 13, 2011) ("Defendants cite 29 differences between Plaintiff's real-life experience and the portrayal of Will James.").

[241] These changes were primarily relevant to the merits of Sarver's publicity claim under California law, which excludes from liability uses of individual personae that are "transformative". *Id.* at *18 (citing Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001)); *see* AQUINO, *supra* note 73, at 26-51, for a thorough but skeptical view of the value and legal effect of such disclaimers.

[242] THE STRANGER (Screen Australia, South Australian Film Corp., Cross City Films, Rocket Science, See-Saw Films, Anonymous Content & Blue-Tongue Films, 2022).

[243] *See* Leslie Katz, *"The Stranger" on Netflix: The True Story That Inspired the Unsettling Thriller*, CNET (Nov. 9, 2022, 12:40 PM PST), https://www.cnet.com/culture/entertainment/the-stranger-on-netflix-the-true-story-that-inspired-the-unsettling-thriller/ [https://perma.cc/EW2T-HETL].

detective never met his subject, who remains anonymous.[244] Even the author of the offending story in the incident of the "Bad Art Friend" changed the identifying details of the individual whom she depicted in telling a valuable story about the fraught emotional context of organ donation.[245]

We, too, would encourage the masking of individual identities in our proposed federal statute, and would categorically immunize from state right of publicity claims those creative works that meaningfully alter the names and likenesses[246] of private individuals depicted,[247] while at the same time publicizing the events experienced by those individuals. We would thus preserve the social value arising from education and discourse about events of public significance while at the same time respecting the legitimate privacy interests of private individuals.

As noted above, such identity masking would not be required for public figures (politicians, entertainers, business moguls, etc.), as we believe that their privacy interests in their NIL are reduced by their voluntary entry into the public arena and because their identities, in a sense, *are* the news.[248] For example, changing the identity of Mark

[244] *See* Stephanie Bunbury, "*So much at stake*": *Joel Edgerton's risky mission for The Stranger*, SYDNEY MORNING HERALD (Oct. 8, 2022), https://www.smh.com.au/culture/movies/so-much-at-stake-joel-edgerton-s-risky-mission-for-the-stranger-20221003-p5bmu3.html [https://perma.cc/7QFV-UCU2].

[245] *See supra* notes 63–65 and accompanying text.

[246] Typically, the use of an actor to portray an individual will satisfy the need to avoid using that individual's "likeness," so long as the actor does not impersonate the appearance of the individual, as, for example, Salma Hayek did when portraying the character Joan in the Black Mirror episode, "Joan is Awful," including the replication of her distinctive dress and hair style. *See supra* note 228. The recent introduction of "deepfake" technology has complicated this landscape, and now makes it possible to fabricate accurate audiovisual likenesses of individuals. *See* Tiffany Hsu, *As Deepfakes Flourish, Countries Struggle with Response*, N.Y. TIMES (Jan. 22, 2023), https://www.nytimes.com/2023/01/22/business/media/deepfake-regulation-difficulty.html [https://perma.cc/TZ7Q-5XCN].

[247] In this regard, the standard could resemble that used in defamation cases. Under California law, for example, "[t]he test is whether a reasonable person, viewing the motion picture, would understand the character . . . was, in actual fact, [the plaintiff] conducting herself as described." Aguilar v. Universal City Studios, Inc., 219 Cal. Rptr. 891, 892 (Cal. Ct. App. 1985) (citing Bindrim v. Mitchell, 155 Cal. Rptr. 29 (1979)).

[248] We recognize that the boundary between public and private figures is a blurred one that will need to be addressed on a case-by-case basis as our proposed statute is

Zuckerberg and Facebook in *The Social Network* would have destroyed much of the immediacy of the film and eliminated the narrative's direct touchstone with the lives of many of its viewers — their shared experiences with Facebook.

c. Constitutional Basis

There is little doubt that federal legislation restricting the scope of state right of publicity claims would be constitutionally permissible. The Supremacy Clause of the U.S. Constitution establishes that federal law is "the supreme Law of the Land" notwithstanding any state law to the contrary.[249] Over the years, Congress has enacted numerous statutory schemes that expressly override inconsistent state law, and such preemption of state law has consistently been upheld by the Supreme Court.[250] Guaranteeing First Amendment freedoms and overriding state law that is contrary to federal First Amendment jurisprudence is clearly within the ambit of the federal government, as repeatedly emphasized by the Supreme Court.[251] Thus, a federal statute preempting specific state laws that conflict with recognized First Amendment guarantees would, almost certainly, survive constitutional challenge.

Federal laws also require a positive source of authority. There are at least two plausible candidates for textual support for congressional passage of the federal law we describe. One is the Commerce Clause,

interpreted as it has in the case of defamation claims. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 282 (1964); (discussing private versus public figures in defamation cases).

[249] U.S. CONST. art. VI, cl. 2.

[250] *See, e.g.*, Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 828-29 (1988) (upholding federal preemption of a state statute that prohibited the garnishment of funds in employee retirement plans subject to the federal Employee Retirement Income Security Act ("ERISA")); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 391 (1992) (upholding federal preemption of state consumer protection statutes prohibiting deceptive airline fare advertisements that conflicted with the federal Airline Deregulation Act); Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 467-68 n.10 (2012) (upholding preemption clause in the Federal Meat Inspection Act that prohibits states from imposing requirements on meatpackers and slaughterhouses that are "in addition to, or different than" federal requirements).

[251] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

which enables Congress to "regulate commerce . . . among the several states."[252] Historically, courts have approved the use of this clause as a basis for congressional action related to intangible property other than copyrights and patents (which have their own source of constitutional authority).[253] One constraint on such a source of law would be that it could regulate only rights of publicity used in interstate commerce. But in the modern, hyperconnected world where identity is established and communicated in online media that transcend not only state but national borders, this requirement would be easily met. Moreover, the docudramas that would be protected from suit by our suggested law are created by producers that typically have a national presence and make content that is transmitted both nationally and globally. For these reasons, the Commerce Clause provides ample support for our proposed federal statute.

d. Benefits to Producers and Subjects

This proposed reform, while parsimonious, would have a salutary effect on the privatization challenges posed by life rights deals. Thanks to fragmented state laws and cases creating uncertainty about the scope of such laws, claims under state rights of publicity represent significant threats to studios that are considering the production of unauthorized docudramas. Eliminating this threat with a clear federal exemption would signal to studios that they are free to make such features and to subjects that they have no property interest in the uses of their identities in them. By the same token, reiterating through statutory modification that true life stories are part of the public domain free for all to use would re-emphasize that there is no cognizable property-like interest that is "granted" by subjects to studios in these deals.

This approach would also benefit parties by providing a bright line rule that life stories lie outside the domain of the right of publicity. As we have discussed, some defendants have made this argument relying

[252] U.S. CONST. art. I, § 8, cl. 3.

[253] *See* Zvi S. Rosen, *Federal Trademark Law: From Its Beginnings*, LANDSLIDE, March/April 2019, at 6, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/federal-trademark-law/ [https://perma.cc/F6TW-PPUL] (tracing the eventual acceptance of the Commerce Clause as a valid basis for federal protection of trademarks used in interstate commerce).

on free speech doctrine. And while these defenses have worked at times, they have failed as well. This illustrates that relying on the Speech Clause to protect the public character of facts is inevitably a risky proposition given that it involves indeterminate judicial balancing of the plaintiff's right of publicity versus the studio's expressive speech interests.[254] As Jennifer Rothman has cautioned, "[i]n trying to determine when speech is unconstitutionally limited by state right of publicity laws, courts have sown confusion and uncertainty, leaving the public and content creators with little guidance."[255] Categorically excluding film and television productions from right of publicity claims would eliminate this uncertainty.[256]

e. Correcting Public Views About Life Story Property

We hope that our proposed reform will also diminish, at least marginally, the burgeoning public belief that individuals enjoy a robust "life story right" that is part of a greater lay perception that our identities can and should be exclusively permissioned and monetized. Law has not only a coercive but an expressive effect.[257] So the passage of general laws that explicitly refute the notion of an exclusive right in one's life story may help to counter this widespread (mis)perception.[258]

[254] *Compare* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.2d 797, 807-11 (Cal. 2001) (using a transformative work approach to mediate between right of publicity and free speech interests, ultimately concluding that the former predominated), *with* ETW Corp. v. Jireh Publ'g. Inc., 332 F.3d 915, 937-38 (6th Cir. 2003) (using the same test but upholding the defendant's speech interests).

[255] ROTHMAN, *supra* note 85, at 138.

[256] This means that rather than conceding that plaintiffs have stated a valid right of publicity claim and then invoking an indeterminate affirmative defense, defendants could argue that plaintiffs have failed to state a cause of action as a first-order matter of black letter law. In the presence of the exceptions we advocate, plaintiffs may well choose not to bring these cases altogether.

[257] *See* Cass R. Sunstein & Richard H. Pildes, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 66 (1995) (observing that laws not only regulate, but also express "value commitments").

[258] *See* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294-95 (1988) (arguing that the expressive as well as the coercive dimension of law can affect how parties bargain and how norms are shaped); Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2170-72 (1996) (showing that relatively small changes in law can express strong signals that can shape behavior).

And more distally, as life story deals adjust to reflect this new legal reality, subjects who enter into these deals will learn (perhaps when the value of the deal is lower than they imagined) that they lack any property-like exclusive right in their life story. This notion may trickle down to others, first inside the entertainment industry, and then more generally.[259]

B. Other Reform Strategies

Our proposal is a modest one: the enactment of a federal statutory prohibition on state right of publicity claims for expressive content (books, film, television) that uses individual life stories. There are, however, other reform strategies that could be considered. In this Section, we analyze, and reject, these in favor of our more limited approach.

1. A Federal Right of Publicity

We propose a federal *limitation* on state right of publicity claims. Our proposal does not involve the creation of a federal right of publicity along the lines of the recent Defend Trade Secrets Act ("DTSA"), which created a federal trade secret right that now exists alongside state trade secrecy laws.[260] Certainly, a federal right of publicity, especially if it pre-empted state publicity laws, would bring consistency to a fractured and ambiguous legal landscape.[261] But we do not suggest (at least here) that

[259] *Cf.* Holly Doremus, *Constitutive Law and Environmental Policy*, 22 STAN. ENV'T L.J. 295, 313-14 (2003) ("Changes in behavioral norms might therefore lead indirectly to changes in values as people internalize the new norms.").

[260] Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified at 18 U.S.C. §§ 1836-39).

[261] *See* ROTHMAN, *supra* note 85, at 182-83 ("Although I have been hesitant to recommend the adoption of a federal right of publicity, the increasing chaos created by the myriad, conflicting state laws suggests that it may be time for federal intervention."). Proposals for a federal right of publicity law have recently surfaced in connection with the unauthorized creation of deepfake reproductions of individuals. *See* Caroline Quirk, *The High Stakes of Deepfakes: The Growing Necessity of Federal Legislation to Regulate this Rapidly Evolving Technology*, PRINCETON LEGAL J. (June 19, 2023), https://legaljournal.princeton.edu/the-high-stakes-of-deepfakes-the-growing-necessity-of-federal-legislation-to-regulate-this-rapidly-evolving-technology/ [https://perma.cc/FV8V-PDCB]. Proposals for a federal right of publicity were made as early as 1998 by the

such a federal right be created. Among other things, we would not want to impose a federal right of publicity on states that do not wish to recognize any right of publicity, or to recognize only a narrow one.

Likewise, we do not propose including additional limitations on state right of publicity laws beyond the exclusion of expressive content. Thus, states would remain free to adopt (or not) further limitations on their rights of publicity by excluding, among other things, political messages, news broadcasts, works of fine art, live impersonations, sports broadcasts, or uses that would qualify as fair use under the Copyright Act.[262] While we support the inclusion of these limitations under state law, and believe that most, if not all, of them are required by the Speech Clause, a full analysis of these other exclusions is beyond the scope of this Article.

2. Copyright Misuse

Copyright misuse is another legal theory under which a subject's assertion of a right of publicity claim against a docudrama could be challenged. The copyright misuse doctrine, which has been successfully used in only a handful of cases, holds that the attempt to leverage a copyright in order to secure exclusive rights not granted under the Copyright Act constitutes a "misuse" of the copyright, and is thus impermissible.[263] The penalty for copyright misuse is severe: it often renders the entire offending agreement unenforceable until the misuse is cured.[264]

International Trademark Association ("INTA"). *See* Int'l Trademark Assn., Right of Publicity Minimum Standards 1 (Mar. 27, 2019), https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/Right-of-Publicity-Minimum-Standards-03.27.2019.pdf [https://perma.cc/MB3T-VV7T]. Notably, the latest INTA proposal includes an exemption for expressive uses such as "[d]ramatic, literary, artistic, or musical works, so long as the use has artistic relevance to the work and does not explicitly mislead as to endorsement or approval by the individual." *Id.* at 2.

[262] *See supra* note 213.

[263] *See* Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 977 (4th Cir. 1990) (explaining that copyright misuse "forbids the use of the [copyright] to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which it is contrary to public policy to grant" and declining to enforce a license on this theory (quoting Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 492 (1942))).

[264] *See Lasercomb*, 911 F.2d at 979.

Some authors have argued that where private agreements tend to unwind public-oriented features of the Copyright Act, courts should decline to enforce those agreements under the misuse doctrine.[265] For example, licenses that accompany software often require users to agree that they will not transfer physical copies that embody the computer program (which is permitted under the first sale doctrine) or engage in reverse engineering (which is considered to be fair use).[266] The same could be argued of agreements that purport to transfer life story rights: these agreements are dealing in content that is dedicated by copyright law to the public domain.

We disfavor this approach for several reasons. First, such a theory, if successfully argued, could render life story agreements unenforceable in their entirety.[267] Yet, as described in Part I.C.3, life story deals have many features that are salutary and efficiency-enhancing. The cooperation and exclusivity provisions of these agreements enable studios to make better features free from concerns about competition from other producers. And, as we explain below, while the portions of these agreements suggesting that subjects have an exclusive economic interest in exploiting their life stories are problematic, provisions limiting potential tort liability (defamation or invasion of privacy) are not. Second, as a practical matter, life story deals are rarely litigated because subjects nearly always comply with them. So courts would have little occasion to apply the copyright misuse defense to life story deals, even if that theory were available. Finally, copyright misuse has only rarely been used successfully and, notwithstanding academic arguments, never as a means to protect the public domain. As a result, we believe that copyright misuse would be far less effective than our proposed federal statute.

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[265] *See, e.g.*, Victoria Smith Ekstrand, *Protecting the Public Policy Rationale of Copyright: Reconsidering Copyright Misuse*, 11 COMMC'N L. & POL'Y 565 (2006) (arguing for an expansive interpretation of the copyright misuse doctrine to preserve incursions on the public domain).

[266] *E.g.*, Davidson & Assocs. v. Jung, 422 F.3d 630, 639 (8th Cir. 2005) (declining to invalidate a software license that precluded users from engaging in reverse engineering); Disney Enters., Inc. v. Redbox Automated Retail, LLC, 336 F. Supp. 3d 1146, 1157 (C.D. Cal. 2018) (declining to enforce a license that required the licensee to forfeit their sec. 109(a) first sale right to re-sell a DVD).

[267] *See Lasercomb*, 911 F.2d at 979.

3. The Indeterminacy of Doctrine

A number of other doctrinal options remain for pushing back against a subject's assertion of property-like rights in their life stories: preemption, the First Amendment, and existing state statutory exemptions. As we show in this Subsection, though, all of these avenues suffer from enough ambiguity that they do not eliminate the uncertainty that currently leads studios to bargain with subjects over "grants" of their life story rights.

a. Copyright Preemption

One could advance a plausible argument that federal copyright law preempts the assertion of property-like rights in life stories because the assertion of ownership in such facts is at odds with federal law (the Speech Clause, the Copyright Act). This was the theory that plaintiffs advanced in lawsuits challenging software license provisions that prohibited uses that would otherwise be permitted under the copyright first sale or fair use doctrines.[268] Yet in these cases federal courts largely rejected this theory, deferring to the ability of private parties to negotiate away their rights, no matter the systemic consequences.

There is also a statutory approach to preemption, one rooted in the Copyright Act itself, Section 301 of which preempts rights under the common law or statutes of a state that are equivalent to copyright. [269] Courts have interpreted this to mean that the Federal Copyright Act preempts state laws having subject matter that falls squarely within the scope of copyright.[270] This theory is theoretically apt when a party invokes a right of publicity that conflicts with a right that is clearly outlined in the Copyright Act, but it does not avail when (as here) there is not a conflict with a positive right articulated in the federal statute.

[268] *See supra* notes 192–93 and accompanying text.

[269] 17 U.S.C. § 301.

[270] Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 226-29 (2002).

Thus, as Rothman has noted, "[t]he vast majority of courts have held that Section 301 does not preempt the right of publicity."[271]

b. First Amendment

As we have noted above, the Speech Clause of the First Amendment provides a direct route to invalidating subjects' assertions of ownership in their life stories. Indeed, this is the leading route some courts have taken in rejecting right of publicity claims against producers that have created unauthorized docudramas. Both the Ninth Circuit in *Sarver* and a California state appellate court in *de Havilland* reasoned that permitting docudrama subjects to claim property-like rights in their life stories would suppress free expression to an extent that would violate producers' rights under the Speech Clause.[272]

But as we have detailed in Part II.A.2, not all courts have taken the same view of the First Amendment.[273] The lower court in *de Havilland* as well as the Missouri Supreme Court in *TCI Cablevision* resolved the tension between free expression and rights of publicity in favor of the latter.[274] And even though the appeals court in *de Havilland* likely had the better view of this issue, the uncertainty created by the fractured doctrinal landscape deprives producers of any confidence that they can easily move to dismiss right of publicity suits filed by docudrama subjects.

It is also true that a decision by the Supreme Court reaffirming the precedence of the Speech Clause over state rights of publicity could achieve the same degree of consistency and authority as a federal statute. Yet the Supreme Court has still never heard a case involving the conflict between the right of publicity and the Speech Clause, and it is highly unpredictable when, if ever, such a case would make its way to

[271] *Id.* at 208 (proposing that the Federal Supremacy Clause be invoked to preempt state publicity laws that contravene copyright law's goals of "the promotion of creation and guaranteeing an expansive public domain from which to create new works").

[272] *See supra* Part II.A.2.

[273] *See* Thomas F. Cotter & Irina Y. Dmitrieva, *Integrating the Right of Publicity with First Amendment and Copyright Preemption Analysis*, 33 COLUM. J.L. & ARTS 165, 189-208 (2010) (applying First Amendment analysis to right of publicity cases).

[274] *See supra* notes 135–137 and accompanying text.

the highest court in the land.[275] As such, the proposed federal legislation, though not without its own challenges, would likely be a faster and more expedient solution.

c. Other State Right of Publicity Exceptions

Finally, as noted in Part III.A.1, above, state right of publicity statutes may already include provisions that effectively exclude claims against docudramas, even if they do not (like the Louisiana statute) do so explicitly. The California appellate court in *de Havilland*, for example, questioned whether the reference to "commercial use" in that state's right of publicity statute extended to the unauthorized use of individual identities in film and television, arguing that the nexus to commerciality in creative works was attenuated.[276]

More promising still is the exception for "newsworthiness" found in some state right of publicity statutes.[277] Because docudramas often address matters of interest to the public, there is a plausible argument that they fall within this exception. Indeed, this was part of the reason that a New York appeals court rejected a right of publicity claim brought by a convicted killer against the studio that made a docudrama about him.[278] But this approach is incomplete at best. First, many courts, even in jurisdictions whose right of publicity law contains such exemptions, have found that subjects have valid publicity claims, albeit ones that are foreclosed on other theories.[279] Moreover, thanks to the fragmented nature of right of publicity laws, many states do not have such

[275] Of course, a determined public advocacy group could undertake a concerted effort to bring a test case all the way to the Supreme Court — a tactic that has been used successfully in a range of civil rights and other forms of impact litigation. *See* Steven A. Boutcher & Holly J. McCammon, *Social Movements and Litigation*, *in* THE WILEY BLACKWELL COMPANION TO SOCIAL MOVEMENTS 306, 310 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi, eds., 2d ed. 2019) ("[P]ublic-interest law groups may . . . over time begin to 'prioritize issues and proactively seek cases for test case litigation.'"). However, we are not aware of a group with the wherewithal or the interest in initiating such a legal campaign.

[276] De Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d. 625, 630 (Cal. Ct. App. 2018).

[277] *See supra* notes 206–207 and accompanying text.

[278] Porco v. Lifetime Ent. Servs., LLC, 47 N.Y.S.3d 769, 770-71 (N.Y. App. Div. 2017).

[279] *E.g.*, Sarver v. Chartier, 813 F.3d 891, 905 (9th Cir. 2016) (denying right of publicity claim brought with respect to film *The Hurt Locker* on First Amendment grounds).

exemptions, or any statutory right of publicity at all (relying solely on common law in the recognition of such rights). Thus, this avenue is of limited value on a national scale.

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Outlining the shortcomings of the above doctrinal options makes clear the advantages of the limited statutory approach that we propose. A single federal law barring application of the right of publicity to expressive works such as docudramas would avoid the uncertainty of relying on individual state law regimes. And a clear statutory bar would avoid the welter of interpretations to which preemption doctrine and the First Amendment are subject. The existence of such a statute would likely deter subjects from bringing right of publicity actions against studios for unauthorized docudramas, and if they did, it would make such suits unlikely to progress far.

C. Answering Objections

In this Subsection, we acknowledge and address potential objections to our proposed federal statute excluding the application of state publicity laws to expressive works.

1. Respecting Identity and Privacy

Perhaps the strongest argument in favor of allowing individuals to assert rights in their life stories is the promotion of important dignitary interests. A life story, one could argue, is profoundly personal, so allowing its exploitation without permission works an insult to the subject's dignity.[280] Under this theory, treating life stories as a form of property recognizes the extent to which they are inextricable from a subject's personhood, and should be exempt from the indifferent valuation of property's dominant market norms.[281] Thus, maximizing

[280] *See, e.g.*, Alan Meisel, *A "Dignitary Tort" as a Bridge Between the Idea of Informed Consent and the Law of Informed Consent*, 16 L. MED. & HEALTH CARE 210, 214 (1988) ("[T]here is something highly personal about one's likeness, one's name and one's life history.") (quoting F. HARPER, F. JAMES & O. GREY, THE LAW OF TORT 637 (2d ed. 1986)).

[281] *Cf.* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-61, 1014-15 (1982) (discussing the relation between property and personhood and

subjects' rights of publicity is a way of allowing them to have autonomy and control over the self: they can exercise the right to prevent the production of docudramas about themselves, or they can ensure that if such docudramas are made, they will be paid for the value of their identity. Doing so prevents the exploitation of individuals by producers who, notwithstanding any social value that they may create, are motivated to do so largely by their own potential to profit.[282]

We address these issues in several ways. First, we seek to eliminate dignitary harms to individuals who wish to maintain the privacy of their personal lives. While we would encourage the continued use of newsworthy *events and facts* in creative works (so long as these events and facts are obtained through legitimate public means), we would not immunize the use of private individuals' names, images, or likenesses ("NIL") in such works. In this way, we would preserve the public interests in education and discourse about current affairs without giving unwanted attention to individuals who are not already in the public eye.

Moreover, we do not argue for a statutory limitation on dignitary torts like defamation or invasion of privacy. This is because giving subjects a *financial* interest in productions based on their lives frustrates public purposes, but inventing false narratives about subjects serves no public value. Even courts that have held that a plaintiff's right of publicity claim is preempted by a defendant's speech or copyright interests, have nevertheless stressed that privacy torts raised in the same complaint survive because they vindicate dignitary rather than economic interests.[283] Thus, under our proposed reform, untrue and harmful statements about an individual would continue to be actionable under state defamation laws.

Finally, producers who obtain private information about an individual (e.g., an unlisted telephone number or a painful or embarrassing private

concluding that "some conventional property interests in society ought to be recognized and preserved as personal . . . [and] that right should be protected . . . against invasion by government against cancellation by conflicting fungible property claims of other people").

[282] *See* Chander & Sunder, *supra* note 156, at 1333-34.

[283] *See* Laws v. Sony Music Ent. Inc., 448 F.3d 1134, 1145 (9th Cir. 2006) (holding that plaintiff's right of publicity claim was preempted by copyright but that defamation and right of privacy claims would survive).

occurrence) and then disclose it without the subject's consent could be liable in tort for the public disclosure of private facts, even with a more limited right of publicity.[284]

By the same token, our proposal does not eliminate all routes by which individuals depicted in docudrama productions can be compensated. Given the continuing threat of defamation and privacy claims, producers are still likely to desire liability waivers from key characters depicted in their productions.[285] Likewise, the provisions of life story agreements that require a subject to cooperate with a production would and should remain intact even after the reforms that we suggest. These are simply service arrangements in which subjects agree to facilitate the development of a production in exchange for agreed consideration. These contractual provisions are not only unproblematic, but desirable because they give the producer assistance and access to materials without which a feature might not be feasible at all. For all of these reasons, life story deals would continue to be desirable both for subjects and producers, even under the limited publicity regime that we propose.

Moreover, our argument that life story *facts* should remain in the public domain does not foreclose individuals from leveraging the right of publicity to seek compensation for other exploitation of their identities. For example, whether athletes can recover against game developers for using their images, moves, and personae in video games is orthogonal to the subject of our proposal, which is limited to the use of facts and events in an expressive medium such as a film or television show.

Finally, it is worth noting that granting individuals — especially less powerful ones — a property-like right in their life stories could create a different path to exploitation. Critics of our approach could argue that a property-like right over life stories would enable individuals to control how their stories are told and who tells them.[286] This point does have

[284] *See supra* note 100 and accompanying text.

[285] One interview subject noted that subjects sometimes walk away from life story rights deals when they understand that signing them means that studios can invent false, and possibly harmful or embarrassing, narratives about their lives. Contreras & Fagundes, *supra* note 5, at 183 n.128.

[286] *See* Dogan, *supra* note 111, at 324-27 (outlining potential upsides of alienable rights of publicity).

some merit. If someone has an exclusive right in their life story, they can simply refuse to permit the creation of content, including but not limited to docudramas, based on their lives. But vesting such rights could also backfire, given the transferability of property interests.

In a world where people enjoyed exclusive property interests in their life stories, such transfers would likely operate in one direction: Less wealthy and powerful subjects would tend to transfer their rights to wealthier and more powerful firms and individuals. No matter how much an individual may wish their story to remain private, if the subject is experiencing economic hardship or is duped by strong-arm tactics of a more sophisticated actor, they may alienate those rights for a sufficient sum. Such transfers would make subjects worse off than they would have been in a world where life stories were public property available for anyone to use, as the subject would, absent a contractual commitment to the contrary, retain the right to tell their story as they wished or to authorize someone whom they trusted to tell it properly. In contrast, allowing the assignment of life stories would irrevocably separate an individual from their story, possibly even silencing them from telling an accurate version to counter a misleading version told by the transferee.[287]

Nor is this concern a mere theoretical possibility. Jennifer Rothman has shown that rights of publicity have sometimes been transferred in ways harmful to subjects.[288] Brooke Shields's mother, strapped for cash, is alleged to have sold Shields's right to her likeness depicted in nude photos taken of her as a child. Shields, even as an adult, was thus powerless to preclude the photos from being displayed.[289] Transferable life story rights have been used to achieve similar ends. As discussed in

[287] The same often happens in copyright, when authors' assignment of works prevents them from exploiting those works without the assignee's consent. John Fogerty, for example, was successfully sued by the record label to which he assigned the copyright in a musical work for including the work in a subsequent album with a different label. Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).

[288] *See* ROTHMAN, *supra* note 85, at 128-31 (describing social costs of transferable rights of publicity more generally).

[289] Jennifer E. Rothman, *What Happened to Brooke Shields Was Awful. It Could Have Been Even Worse*, SLATE (Apr. 18, 2023, 1:00 PM), https://slate.com/human-interest/2023/04/brooke-shields-hulu-documentary-child-stars.html [https://perma.cc/VN4Y-KWY6].

Part I.B.1.b above,[290] Johnny Ferraro, co-creator of *American Gladiators*, bought the life rights of co-creator Dann Carr in an attempt to prevent Carr from participating in film projects about *Gladiators*, presumably because Ferraro wanted to prevent Carr from casting him in a negative light.[291] All of these considerations support the free usage of life story events unburdened by the exclusivity associated with property rights.

2. The Stakes of Life Story Deals and the Virtues of Incrementalism

Critics might also argue that our recommendation is too modest and no more than a marginal adjustment to existing law. It does not affect all aspects of identity, only life stories used in docudramas. And we do not argue that these deals are broadly invalid, only that they need to be calibrated to avoid creating unwarranted property-like interests rooted in the right of publicity.

Yet our proposed reform is not merely a formalistic effort. Resolving the tension between the public domain and the right of publicity will make for better creative content. Without any credible threat of publicity liability, life story deals could become substantially cheaper. This may not make much difference to major film studios or streaming networks, but it could make a difference to independent filmmakers, who operate on much smaller budgets. If life story deals were less costly, and/or if unauthorized docudramas became more feasible, there would likely be more indie works in this genre, promising a wider range of higher-quality content. The reform we propose, and the concomitant reduction in cost and risk associated with docudrama productions, could lead not only to more productions of this kind, but also to productions that cover more ground in terms of the personalities and events that they portray (i.e., a production that depicts three principal characters rather than one).

Fixing life story deals would also promote more distal positive effects. Larry Lessig has warned of a creeping "permission culture."[292] This is

[290] *See supra* note 109 and accompanying text.

[291] *Id.*

[292] LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 192 (2004) (coining the phrase

the notion that users often feel obliged to seek permission to use any preexisting material, even if it is legally part of the public domain.[293] Life story deals exemplify this permission culture. Producers seek the permission of, and pay, docudrama subjects knowing that they are not legally required to do so out of fear of liability and negative optics. But if individuals can leverage their rights of publicity to require payment for use of their life stories in docudramas, then why not leverage those "rights" to require payment for discussing them in nonfiction magazine profiles or news articles? Sending a clear legal message that producers are free to use life story facts under both federal and state law would not only encourage better pricing and negotiation for docudramas. It would also remind subjects that, as the *de Havilland* court put it, they "do not own history."[294]

Finally, and relatedly, is the systemic importance of vigilance against even seemingly small erosions of the public domain. Our ecosystem of creativity and free expression is, like the physical environment, under constant threat of encroachment by private interests. This is true because public choice theory suggests, and history illustrates that, the concentrated, well-funded interests of owners will tend to overbear the diffuse interests of the public.[295] Any individual diminution of the public domain will almost always seem inconsequential, or at least less consequential than the interests of private owners on the other side of the dispute. If we look just at the costs and benefits of any one decision relating to the divide between public and private rights in information, it is likely that that divide will continue to move in the direction of private rights swallowing public territory. The way to counter this systemic trend is to consider not just the local impacts of a given decision, but the systemic ones as well.[296] Conflicts over the use of life

"permission culture" to describe a creative ecosystem in which the strong default is to require permission to make new works regardless of limits on owners' rights).

[293] See *id.*

[294] de Havilland v. FX Networks, LLC, 230 Cal. Rptr. 3d 625, 630 (Cal. Ct. App. 2018).

[295] *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 72-73 (2003) (discussing copyright and the public domain in the idiom of the public choice dilemma).

[296] *See id.* at 73. ("The idea of the public domain takes to a higher level of abstraction a set of individual fights . . . . [A]n emergent concept of the public domain could tie

stories in docudramas engage more than just owners and producers, but the ecosystem that preserves public access to information generally. And the survival of that ecosystem demands that we take seriously all threats to the public domain, even if they seem minor or remote from our own interests.

CONCLUSION

Though the law seeks to consign individual life stories to the public domain, private control over these factual accounts is increasing. Abetted by strong popular intuitions about ownership, docudrama subjects can leverage the expansive right of publicity to demand that studios pay them for their life story "rights" even though positive law vests no such rights. While these life story acquisitions may seem to do little more than effectuate beneficial private ordering, they actually have the pernicious effect of effectively converting an essential part of the public domain into private property, thereby upsetting the balance of shared and proprietary information on which our systems of free speech and creative expression depend.

In response, we propose that Congress enact a new federal statute barring the assertion of state rights of publicity against creative productions such as fact-based books, films, and television programs. If the persons depicted are private individuals, this bar on claims would only apply categorically if their names, images, and likenesses are changed in the production to protect their identities, though producers who elected to use the real names and likenesses of such individuals could still raise First Amendment defenses against claims based on state right of publicity statutes. Having a single, clear rule that operates *ex ante* at the federal level would provide uniformity and clarity that will secure the status of life story facts as part of the public domain while preserving subjects' dignitary, reputational, and privacy interests.

together the interests of groups currently engaged in individual struggles with no sense of the larger context.").