

## **The Special Problems of Docudramas: No Shortcuts in the Clearance Process**

**By Ted F. Gerdes**

Television docudramas such as "Murder in Mississippi," "Drug Wars: The Camarena Story," "The Prize Pulitzer," and "Roe vs. Wade" have become an integral part of entertainment. Thirty-five docudramas and fictional works inspired by fact are slated for broadcast this television season alone.

A mixture of fact and fiction is flammable. Real TV (reality-based programs such as "Rescue 911" and "Unsolved Mysteries"), docudramas and works inspired by real events flag a number of critical legal issues. Docudrama and fact-based fiction projects must be reviewed for potential legal problems: defamation, invasion of privacy, copyright infringement, trade disparagement and others. Clearance is a preventive process. It is intended to minimize, if not eliminate, potential lawsuits, which are expensive to defend.

There are no shortcuts in the clearance process. The script must be reviewed line by line if necessary, along with the material upon which the script is based. This process must be followed to finished production. A checklist of concerns can be used to spot potential problems. Then it must be determined whether the potentially problematic fact or statement creates sufficient concern to warrant change in the script and a confrontation with the producer and/or the writers over a scene or a line of dialogue.

The two major areas of law to review are defamation and privacy. In California, defamation is still broken down into libel, which traditionally takes the form of a writing,<sup>1</sup> and slander, which is a defamatory statement "orally uttered."<sup>2</sup> Libel is the publication of a defamatory and false statement of fact of and concerning plaintiff, which injures a plaintiff and is published with the requisite degree of fault.<sup>3</sup> Slander includes "communications by radio or any mechanical or other means."<sup>4</sup> Slander includes television broadcasts. Film - and the docudrama as a sub-category of film - has always been classified as a writing.

With docudramas, the issue of publication generally will be uncontested since the movie will be shown in theaters or broadcast on television. Remaining areas for examination are whether the statements are defamatory, false, of and concerning the potential plaintiff, published with the requisite degree of fault and injurious to the plaintiff. These elements are easy to check when reviewing a docudrama.

Greta Garbo's famous line, "I want to be alone," best describes the essence of privacy law - the right of an individual to be left alone. Dean William Prosser, renowned authority on torts, set forth the right to privacy in four distinct torts: public disclosure of embarrassing private facts; publicity which places one in a false light in the public eye; an intrusion upon one's seclusion or solitude or into one's private affairs and appropriation of one's name or likeness.<sup>5</sup>

While defamation law is a protection of one's reputation, privacy is a protection of one's sensitivities and feelings. A major difference is that truth is a defense to libel; it is not necessarily a defense to privacy actions. With privacy, the portrayal of an individual may be accurate yet still actionable.

To assist in the clearance process, the writers must prepare an annotated script, the purpose of which is to provide the person responsible for the review process with information necessary to properly evaluate the risk of a lawsuit. The annotations should supply precise references to the underlying works such as a book, newspaper and magazine articles. The more inflammatory the material, the more important the source of the information. Multiple sources, which are consistent with one another as to fact, are always preferred. The annotations should provide the following information about the script:

*Characters.* Each character, company or other entity in the script must be categorized as living, dead, real, fictional, or composite. Then further information must be provided for each character or entity, including who the character represents; the importance of his, her, or its role in the script; age; nationality and occupation of the character; and any other information, which would assist in determining whether or not the person upon whom the character is based is likely to sue.

*Dialogue.* Each line of dialogue must be categorized as accurate, probably accurate, or fictional. Also, the sources of each line of dialogue must be identified. This is of particular concern when the dialogue is completely or partially invented. In a recent decision, the Ninth Circuit held that invented dialogue is not actionable merely because it has been invented.<sup>6</sup> This does not, however, give a writer a carte blanche to put words in character's mouths with impunity.<sup>7</sup> Care must be taken to insure that the dialogue creation can be supported by the source's information or that such dialogue is innocuous.

*Scenes.* Scenes should be examined in the same manner as the dialogue. The accuracy of each scene must be determined and the source material for the information must be provided. For the most part, annotating the dialogue will reveal problems with the scenes as well.

A series of questions can be put to the annotated script to isolate the truly sensitive areas, which will warrant a detailed review. These questions provide guidance as to what devices can be used to eliminate or at least minimize any problems.

## **NO HARM, NO FOUL**

The initial question is whether the portrayal is positive or negative; *i.e.*, is it defamatory? If the story portrays a real individual in a positive, or at least a neutral light, defamation and privacy concerns are minimized. Even if the story contains an untrue statement or the individual is portrayed in an inaccurate manner, he or she has little reason or desire to complain. This is affectionately referred to by some attorneys as the "No Harm, No Foul" rule.

A defamatory statement is like pornography - difficult to legally define but you know it when you see it. According to Prosser, defamation is a statement, which can "diminish the esteem, respect, good will, or confidence in which the plaintiff is held, or to excite adverse derogatory or unpleasant feelings or opinions against him. It necessarily involves the idea of disgrace."<sup>8</sup>

Defamation is a relative term. If the story is about "night stalker" Richard Ramirez, the serial killer convicted in Los Angeles last year, little can be said that would injure his reputation. On

the other hand, if a story is about an individual who enjoys a reputation of high esteem, such as Jacqueline Onassis, the range of potentially defamatory statements is much greater. The statements must be examined within the context of the story, taking into account who they are made about and whether or not the statements could injure that individual's reputation.

The second question to ask is whether or not the subject of the statement is living or dead. It is difficult for dead people to sue, not merely because they have grave difficulty in drafting a complaint, but because the law does not permit it. The torts of defamation and invasion of the right of privacy do not survive the death of the individual. <sup>9</sup> A deceased individual depicted in a docudrama is limited to the remedies set forth in legislation such as California Civil Code Section 990. <sup>10</sup> As set forth in this statute, survivable property rights are limited to commercial exploitation such as product endorsement and merchandising.

The third question to ask is whether a statement or fact is true or accurate. If not, there can be consequences. In a suit for defamation, the plaintiff must prove a statement is false. <sup>11</sup> Whether or not a statement is false normally can be determined from the background material for a script. But often, sources of information contradict one another. The credibility of the sources must be examined and if necessary supplemental back up information must be requested. If the supplemental sources do not illuminate the accuracy of the statements and the statements are sensitive, they should be eliminated.

If a statement can be clearly verified, its placement in a script should not be a concern. Caution and common sense should always be exercised. Just because three witnesses state something as fact may mean only that they are repeating the same misinformation. Having three sources of the same information will assist in defending a case; it can be used to mitigate any showing that the publication of the defamatory statement was negligent or malicious, but it will not make an untrue fact true. Look for the truth - especially if the fact or statement is controversial, emotionally charged, or derogatory; that is, potentially defamatory.

Determining the truth of a statement is not always enough. Context must also be examined. It must be asked if the portrayal of that fact, or if the picture painted for the viewer by the writer, is also accurate. Truth is dispositive in an action for defamation but not necessarily in an action for invasion of privacy. The two types of privacy invasion of primary concern in clearance are false light invasion and disclosure of embarrassing facts.

## **FALSE LIGHT**

A false light invasion occurs when a true fact is portrayed in such a manner that a damaging impression is created in the eyes of the viewer. The consummate example is found in *Gill v. Curtis Publishing Co.* <sup>12</sup> and *Gill v. Hearst Publishing Co.* <sup>13</sup> where the identical photograph of a couple was published in two different publications and one was deemed actionable and the other was not. In the first case, the photograph was published with the caption "instantaneous powerful sex attraction - the wrong kind of love." The court held that the photograph was an accurate depiction of the couple but the picture with the caption gave a completely different impression of the individuals portrayed. In the latter case, the photograph was published with the neutral

caption "immortalized in a moment of tenderness" and was deemed to be a permitted use of the couple's likeness.

False light often is compared to defamation. False light is truth altered so that it is no longer an accurate portrayal and can injure a person's reputation. Even if the false light is purely coincidental, it still is actionable. An example of an accidental false light portrayal occurred in *Kerby v. Hal Roach Studios*.<sup>14</sup> A motion picture studio, in advertising a motion picture, sent fictitious personal letters to men suggesting a rendezvous. This letter was signed by the fictional character Marion Kerby. As it turned out, there was a real Marion Kerby who was subjected to adverse publicity and embarrassing phone calls.

## **DISCLOSURE OF EMBARRASSING FACTS**

Public disclosure of embarrassing private facts also may cause harm to an individual though the facts are true. In the case of *Melvin v. Reid*,<sup>15</sup> a woman who had been a prostitute and involved in a notorious trial was depicted many years later in the motion picture *The Red Kimono*. Since the notorious trial, the woman married, had a family and removed herself from the public eye. When the movie was released, it linked her to her past and she was abandoned by her friends. A court permitted recovery. The opposite result can be found in *Sidis v. F.R. Publishing Corp.*<sup>16</sup> where a libel award against the *New Yorker* was reversed where it published an article about a child prodigy in his later life showing how he had not lived up to the expectations placed upon him in childhood. He was living a rather menial life. Both of these cases involved works that were accurate and true but they brought to public light facts which the *Red Kimono* court felt were better left uncovered.

In these types of cases the key factors the courts consider in determining whether an individual's privacy has been invaded are: length of time since the public event occurred,<sup>17</sup> whether disclosed facts are highly offensive to the reasonable person,<sup>18</sup> whether the plaintiff previously disclosed the fact to the public,<sup>19</sup> whether the events are newsworthy,<sup>20</sup> whether the information was obtained from the public record,<sup>21</sup> and whether the plaintiff is a public or private figure.<sup>22</sup>

## **FACTS V. OPINION**

"There is no such thing as a false idea." This platitude was coined in *Gertz v. Robert Welch, Inc.*<sup>23</sup> The Gertz court continued: "However pernicious an opinion may seem, we depend not on the conscience of judges and juries but on the competition of other ideas."<sup>24</sup>

The United States Supreme Court recently clarified the opinion defense in *Milkovich v. Lorain Journal Co.*<sup>25</sup> by ruling that the Gertz Court's use of the word opinion was intended to mean a statement expressing an idea or rhetorical hyperbole. Couching a statement as an opinion will not insulate a defendant from liability if the statement is proved to be false.<sup>26</sup>

Distinguishing between fact and opinion can be difficult. Again, the context is critical. It depends upon whether the ordinary reader would perceive the statement as fact or opinion.

*Hustler* magazine's discussion of an individual under the heading "Asshole of the Month" was deemed opinion.<sup>27</sup> Other examples of opinion include: "fascist and fellow traveler of the radical

right", referring to William F. Buckley; <sup>28</sup> a professor unqualified for tenure; <sup>29</sup> a "tone deaf professional singer; <sup>30</sup> and an incompetent judge. <sup>31</sup>

Another object of examination is whether a real individual can be identified. In defamation the question is whether or not the statement is "of and concerning" an individual or entity portrayed. <sup>32</sup> In privacy law this phrase is not used but the concept is fundamentally the same. Businesses, corporations, and trademarks also can be damaged by disparaging remarks.

In docudrama and fact-inspired fiction, there are three types of characters: real, fictional, and composite. The identity of real characters is clear. Pure fictional characters present no problem because fictional characters cannot sue. The difficulty with composite characters is making sure they cannot be identified with real persons on whom they are based.

The key with fictional characters is to verify that they are truly fictional. It must be determined that the writers did not subconsciously base a character upon a real individual who is identifiable and that no coincidental connection exists between the character and any real person. The *Kerby* <sup>33</sup> case is an example of accidental identification.

When a character is a composite, part fact and part fiction, it must be examined to insure that none of the composite parts can be identified as a real person - especially if the character involved is controversial. In *Bindrim v. Mitchell*, <sup>34</sup> an author significantly altered the characteristics of a character in her novel so it would not be associated with any real person, yet the plaintiff was allowed to recover because he was deemed identifiable nevertheless. *Bindrim* was a clinical psychologist who conducted nude encounter therapy groups. He managed to persuade a jury that he was the character in the Gwen Davis novel *Touching* though most people who knew him would not associate him with the unprofessional character in the book.

The opposite result was reached in *Aguilar v. Universal City Studios*, <sup>35</sup> where the plaintiff failed to show the connection between a fictionalized character and herself though the fictional character had the same first name. *Davis v. Costa Gavras* <sup>36</sup> discusses the connection between real individuals and characters portrayed in the motion picture *Missing*. The plaintiffs failed in that case not because identity was not shown but because they failed to overcome First Amendment burdens. These First Amendment burdens can be insurmountable by a plaintiff.

## **PUBLIC V. PRIVATE FIGURE**

Another concern is whether or not the individual portrayed is a public or private figure. The historic case of *New York Times v. Sullivan* <sup>37</sup> placed a constitutional overlay on the law of defamation pertaining to public officials and *Gertz v. Robert Welch, Inc.* <sup>38</sup> defined the standards for private figures. These standards were applied to privacy in *Time, Inc. v. Hill*. <sup>39</sup>

The Supreme Court in *Philadelphia Newspapers v. Hepps* <sup>40</sup> said the two main issues of concern in defamation are: (1) whether the plaintiff is a public or private figure; and (2) whether the speech is of public concern. <sup>41</sup> The distinction between public and private figures is complex but the distinction can be simplified for the purpose of docudrama clearance.

Under the *New York Times v. Sullivan* standards, if the person portrayed is a public figure, then the publication must be made with malice and, if the individual portrayed is a private figure, then negligent publication will be sufficient to maintain a cause of action. A private figure usually is an average citizen and a public figure is easy to spot: a politician, a movie star, a sports figure. The difficult ones are those who fall in between; the star who has retired and is no longer newsworthy or the average citizen who through an act of fact has become a newsworthy and public figure. Jessica McClure, the Midland, Texas, toddler who fell into a well, became a public figure for at least a time by attracting public concern. Norma McCorvey, the real-life Jane Roe of *Roe v. Wade*, also is a temporary public figure. The public/private figure distinction, although critical in determining fault, usually is less of a problem for docudramas because such care is taken in the production to insure fairness. In fact, the clearance procedures themselves can be enough to rebut an attempt to prove negligence.

The critical difference is that there is more latitude in dealing with public figures than private ones. If the person portrayed is a private figure, much more caution and care must be exercised in the portrayal.

The right of privacy invasions of intrusion and appropriation of a person's right of publicity do not surface often in a docudrama context but it is important to be aware of these areas.

## **INTRUSION**

Intrusion is another area of concern in docudrama clearances. "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another of his private affairs or concerns is subject to liability to the other for an invasion of privacy if the intrusion would be highly offensive to the ordinary person." <sup>42</sup>

Examples of this type of intrusion are wire-tapping, eavesdropping, persistent paparazzi, <sup>43</sup> and hidden camera interviews. <sup>44</sup> Intrusion occurs in the news gathering process and the circumstances under which information in a docudrama was obtained should be examined. If the sources and methods used by the writers are at all suspicious, backup information should be requested. Otherwise, cut the material - especially if it is sensitive.

## **RIGHT OF PUBLICITY**

The right of publicity is the right of an individual to be free from having his name or likeness exploited commercially without his consent. This is considered more of a property right and is applicable when the use of the name and likeness is commercial. <sup>45</sup> Docudrama use is not generally considered commercial. While singer Bette Midler can prevent an ad agency from imitating her voice in an advertisement for automobiles, <sup>46</sup> she would have difficulty stopping an actress from portraying her in a motion picture about public aspects of her career. <sup>47</sup>

## **COPYRIGHT**

Potential copyright problems also need to be addressed. Copyright law works into docudrama analysis because scriptwriters invariably work from other material such as books and magazine articles in preparing their scripts. Writers must be careful to not infringe the copyrights of other

authors. Since docudramas normally deal with facts, eliminating copyright problems can be simple. Facts are not protected under the copyright statute: they are considered to be the same as ideas. It is the expression of these ideas or facts, which can be protected; an infringement may be actionable if the expression is copied. The copyright law does not prohibit different writers from copying from the same public domain source such as a trial transcript or arrest report. If books, articles or other works, which are entitled to copyright protection, exist on the subject, the materials must be scrutinized and compared to the script to insure that no unique facts nor any expression is copied. 48 If a book or an article has a unique angle on a story being portrayed, then the producers should consider purchasing rights from the owner of that work.

## **RELEASES**

It is possible to produce a docudrama without obtaining a single release from any individual portrayed. The news media and trial transcripts are valuable resources. As long as the production portrays events as reported and within a reasonable time after the reports, it is unlikely that a suit for privacy or defamation will develop. If it does develop, it is very defensible. However, the objective of a clearance review is to avoid lawsuits. Releases are one of the safest ways to prevent litigation. A signed release does not guarantee that the signer will not sue but it minimizes the chances of suit and limits action to a suit for breach of the release agreement. For this reason releases must be carefully drafted.

The initial step is to target the parties from whom releases must be obtained. Theoretically, having releases from everyone in the production makes life easier but this is not always necessary or desirable. The decision to obtain them is based as often upon budgetary restrictions and dramatic reasons as upon legal concerns. A person signing a release expects to be paid. The amount of payment depends upon the stature of the releasor and how indispensable to the production this individual is.

Often, releases are necessary to obtain new and insightful information about a character that has not been portrayed in the press. For example, in a docudrama about the arrest and conviction of a notorious drug dealer, if the writers want to develop the love interest of the main character it would be necessary to obtain the release of the main character's girl friend or wife. The record of the criminal trial is not likely to contain these facts. If a main character to be portrayed has written a book, it may be prudent to obtain a release from this individual and also to purchase the motion picture rights in the book from the publisher.

At minimum, releases should contain the rights to use the name and likeness of the individual in connection with the production including all publicity and advertising, to represent and or impersonate the individual under his own name or a fictitious name, to include in the work any incidents, characters, dialogue, scenes or situations which the producers desire in order to dramatize the story, the right to distribute the work, in all media in any manner the producers see fit and, most important, a release of any and all claims for invasion of privacy, defamation and any other injury to person or reputation now known or created in the future.

Sometimes an individual is hired as a consultant to advise the producers of the accuracy of the events as the story is being written. Producers sometimes frown on hiring lay individuals as

consultants to a project because they do not want naïve strangers sticking their noses into the development and production process. The benefit of having a principal character involved as a consultant is that the likelihood of a lawsuit is practically nonexistent and, if a suit is brought, the involvement of the individual provides an excellent defense.

Suits are likely to be avoided because any complaints an individual has about the portrayal are likely to surface as it is being written or filmed. The producer can resolve these concerns by convincing the individual of the creative need for the complained of material or the offensive material can be deleted or altered. If an individual who has acted as a consultant sues, involvement in the production coupled with a release is good evidence of a waiver of any rights.

The consulting agreement should contain, in addition to release language, express language that the consultant has been hired as a consultant only, that the producer is paying for advice when requested, that the consultant has no power to change anything and that the producer's word is final. Exceptions are made when the consultant demands approval of some items and the producer's lawyers feel a need to have this person's cooperation. This is not desirable because it gives an often inexperienced individual real control over the production process. If the story is a positive portrayal, script approval is less likely to cause problems. If script approval is granted, the attorney must make sure the producers are prepared to eliminate questionable material from the script and that there is a quick and final mechanism for resolving any disputes that may arise.

## **DISCLAIMERS**

Disclaimers are used routinely to disavow any similarities between fictional characters and real people. Disclaimers are often used even though a show is completely fictional. The purpose of a disclaimer is to remind the audience that artistic license may have been employed.

They can also be used to point the audience to the main source of the underlying information, such as a book. This informs the viewer that events portrayed were seen through the eyes of a particular individual. If the author was a participant in the events, a disclaimer can serve as notice to the viewer that the events portrayed may have been colored by the participant's opinions.

The disclaimer may assist in defense of a lawsuit. It is not, however, a complete defense. It can be used to rebut a charge of negligence or malice. It can be used to show the producers acted carefully but it will not make a damaging portrayal less injurious. Disclaimers should not be used as a substitute to careful review. They are merely a supplemental device.

Finally, the most helpful device in preventing a lawsuit is the editing machine. If a line or scene is potentially defamatory and it cannot be supported by reliable sources then it must be cut. Sometimes this ruins the dramatic impact of a story because it is often the controversial scenes that maintain a viewer's interest through commercials. Remember: the same scenes may later hold a jury's interest at a trial in which the plaintiff is given a large damage award.

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- 1 Civ. Code §45,
- 2 Civ. Code §46.
- 3 Civ. Code §45.
- 4 Civ. Code §46.
- 5 Prosser, Privacy, 48 Cal. L. Rev. 383 (1960).
- 6 Masson v. The New Yorker Magazine, Inc., 881 F.2d 1452 (9th Cir. 1989).
- 7 Hansen, Docudrama - Invented Dialogue, Impersonation, and Concocted Scenes: Beware of Lurking Lawsuits, 5 The Entertainment and Sports Lawyers No. 3 (Spring 1987).
- 8 Prosser, Law of Torts (4th ed. 1971), 739, n4.
- 9 Lugosi v. Universal Pictures, 25 Cal. 3d 813 (1979); Coverstone v. Davies, 38 Cal. 2d 35 (1952).
- 10 Id. Weinstein, Commercial Appropriation of Name or Likeness Revisited, 22 Bev. Hills B.J. 192 (Summer 1988); Rohde, Dracula: Still Undead, Unresolved Right-of-Publicity Questions Are Sure to Haunt the Courts, California Lawyers, April 1985, at 51; Brassell and Kulzick, Life After Death for the California Celebrity, Los Angeles Lawyer, January 1985, at 10.
- 11 Civ. Code §45; Washer v. Bank of America, 87 Cal. App. 2d 501, 509 (1948).
- 12 40 Cal. 2d 224 (1953).
- 13 38 Cal. 2d 273 (1952).
- 14 53 Cal. App. 2d 207 (1942).
- 15 112 Cal.App. 284 (1931).
- 16 113 F.2d 806 (1940).
- 17 Forsher v. Bugliosi, 26 Cal. 3d 792 (1980).
- 18 Briscoe v. Reader's Digest, 4 Cal. 3d 529 (1971).
- 19 Sipple v. Chronicle, 154 Cal. App. 3d 1040 (1984).
- 20 Diaz v. Tribune, 139 Cal. App. 3d 118 (1983).
- 21 Cox Broadcasting v. Cohen, 420 U.S. 469 (1974).
- 22 Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986); Time, Inc. v. Hill, 385 U.S. 374 (1967).
- 23 418 U.S. 323, 340 (1974).
- 24 Id.
- 25 U.S. (1990).
- 26 Id.
- 27 Ault v. Hustler, 860 F.2d 877 (9th Cir. 1987).
- 28 Buckley v. Little, 539 F.2d 882 (1976).
- 29 Byars v. Kolodziej, 363 N.E.2d 628 (1977).
- 30 Orbach v. N.Y. News, 3 Med. L. Rptr. 2229 (1978).
- 31 Rinaldi v. Holt, Rinehardt & Winston, Inc. , 397 N.Y. 2d 943, 42 N.Y. 2d 369 (1977). See The Courts and The News Media (5th ed.) available from the California Judges Association, Fox Plaza, Suite 208, 1390 Market Street, San Francisco, California 94102.
- 32 Civ. Code §45.
- 33 53 Cal. App. 2d 207 (1942).
- 34 92 Cal. App. 3d 61, cert. Denied, 444 U.S. 984 (1979), rehearing denied, 444 U.S. 1040 (1980).
- 35 12 Med. L. Rptr. 1955 (1985).
- 36 654 F. Supp. 653 (S.D.N.Y. 1987).

37 376 U.S. 254 (1964).

38 418 U.S. at 328.

39 385 U.S. 374 (1967).

40 475 U.S. 767 (1986).

41 Hansen, *supra* note 7, at 16.

42 Restatement (Second) of Torts §625; 5 Witkin, *Summary of California Law*, Torts §580 (9th ed.).

43 Galella v. Onassis, 8 Med. L. Rptr. 1323 (1982).

44 "Inside to Air with or without Doctor Response," *Variety*, Feb. 8, 1990 at 2, col. 3.

45 See *supra* note 10.

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

47 Sinatra v. Wilson, 2 Med. L. Rptr. 2008 (1977).

48 17 U.S.C. §102(b).